Supreme Court, U.S.
MAY 7 - 2010
OFFICE OF THE CLERK

No. 09-803

In the Supreme Court of the United States

JANNERAL DENSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
BARBARA L. HERWIG
TEAL LUTHY MILLER
MICHAEL P. ABATE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in affirming judgment for two individual Customs Service officers on petitioners' Fourth Amendment claims, brought under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

2. Whether the court of appeals erred in affirming judgment for the United States on petitioners' claims under the Federal Tort Claims Act.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 15
Conclusion 28
Appendix A – Order (Aug. 22, 2005) 1a
Appendix B – Order (Oct. 4, 2005) 24a

TABLE OF AUTHORITIES

Cases:

Agency for Health Care Admin. v. *Associated Indus. of Fla., Inc.*, 678 So. 2d 1239 (Fla. 1996), cert. denied, 520 U.S. 1115 (1997) 23

Allstate Ins. Co. v. *Ginsburg*, 863 So. 2d 156 (Fla. 2003) 9

Behrens v. *Pelletier*, 516 U.S. 299 (1996) 19

Birnbaum v. *United States*, 588 F.2d 319 (2d Cir. 1978) 27

Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 8

Caban v. *United States*, 728 F.2d 68 (2d Cir. 1984) 26

Carlson v. *Green*, 446 U.S. 14 (1980) 21

Champion v. *Gray*, 478 So. 2d 17 (Fla. 1985) 23

City of Miami v. *Sanders*, 672 So. 2d 46 (Fla. Dist. Ct. App. 1996) 15

Dalrymple v. *United States*, 460 F.3d 1318 (11th Cir. 2006) 26

Cases—Continued: Page

Del Rio v. *United States*, 833 F.2d 282 (11th Cir. 1987) 23
Farmer v. *Perrill*, 275 F.3d 958 (10th Cir. 2001) 21
FDIC v. *Meyer*, 510 U.S. 471 (1994) 26
Fisk v. *United States*, 657 F.2d 167 (7th Cir. 1981) 23
Friedman v. *United States*, 927 F.2d 259 (6th Cir. 1991) 26
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 16
Harris v. *Lewis State Bank*, 436 So. 2d 338 (Fla. Dist. Ct. App. 1983) 24
Johnson v. *Sawyer*, 47 F.3d 716 (5th Cir. 1995) 26
Metropolitan Life Ins. Co. v. *McCarson*, 467 So. 2d 277 (Fla. 1985) 23, 24
Montellier v. *United States*, 315 F.2d 180 (2d Cir. 1963) 23
Neagle, In re, 135 U.S. 1 (1890) 14
O'Brien v. *Food Fair Stores, N. Dade, Inc.*, 155 So. 2d 836 (Fla. Dist. Ct. App. 1963) 24
Ochran v. *United States*, 273 F.3d 1315 (11th Cir. 2001) 26
Oladeinde v. *City of Birmingham*, 230 F.3d 1275 (11th Cir. 2000) 19
R.J. v. *Humana of Fla., Inc.*, 652 So. 2d 360 (Fla. 1995) 23
Saucier v. *Katz*, 533 U.S. 194 (2001) 16
Scales v. *United States*, 685 F.2d 970 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983) 22

Cases—Continued: Page

Schwarder v. *United States*, 974 F.2d 1118 (9th Cir. 1992) 23
Swint v. *City of Wadley*, 51 F.3d 988 (11th Cir. 1995) ... 19
United States v. *Arvizu*, 534 U.S. 266 (2002) 16
United States v. *Cortez*, 449 U.S. 411 (1981) 16
United States v. *De Montoya*, 729 F.2d 1369 (11th Cir. 1984) 18
United States v. *Montoya de Hernandez*, 473 U.S. 531 (1985) 10, 13, 16, 17, 18
United States v. *Pino*, 729 F.2d 1357 (11th Cir. 1984) ... 18
United States v. *Vega-Barvo*, 729 F.2d 1341 (11th Cir.), cert. denied, 469 U.S. 1088 (1984) 18
Wisniewski v. *United States*, 353 U.S. 901 (1957) 23

Constitution, statutes and rule:

U.S. Const.:
Art. VI, Cl. 2 (Supremacy Clause) 13, 25, 26, 27
Amend. IV ..... *passim*
Federal Tort Claims Act:
28 U.S.C. 1346(b) 8, 24, 27
28 U.S.C. 2402 9
28 U.S.C. 2671-2680 8
28 U.S.C. 2674 24
28 U.S.C. 2676 ..... 11, 21
28 U.S.C. 2680(a) 13, 25
28 U.S.C. 2680(h) 27
Fed. R. Civ. P. 50 19

In the Supreme Court of the United States

No. 09-803

JANNERAL DENSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-77a) is reported at 574 F.3d 1318. The opinions of the district court (Pet. App. 78a-118a; App., *infra*, 1a-23a, 24a-49a[1]) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2009. A petition for rehearing was denied on October 6, 2009 (Pet. App. 127a-128a). The petition for a writ of certiorari was filed on January 4, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Two relevant opinions of the district court were not appended to the petition and are therefore included in an appendix to this brief.

STATEMENT

1. On February 12, 1997, petitioner Janneral Denson (petitioner) flew from Miami to Jamaica. Pet. App. 4a. She stayed in Jamaica for less than two days, then returned to the United States carrying only a purse, a manila folder, and a small bag. *Id.* at 7a. Petitioner returned to the United States through the Fort Lauderdale International Airport. *Id.* at 4a.

Because South Florida is "a notorious entry point for narcotics smugglers," the United States Customs Service employs several levels of screening at South Florida airports. Pet. App. 3a. When a passenger deplanes, she first passes through a primary checkpoint, where inspectors check her documents and ask routine questions about the purpose of her trip. *Ibid.* If nothing appears out of the ordinary, the inspector clears the passenger for entry into the United States. *Ibid.* Before the passenger reaches the main terminal, there is a second checkpoint, where Customs inspectors scan the crowd to look for any unusual or suspicious activities. *Id.* at 3a-4a.

When petitioner's plane arrived in Fort Lauderdale, Customs inspectors were "on high alert," because Jamaica is known to be a source country for smuggling narcotics into the United States. Pet. App. 3a-4a. After deplaning in Fort Lauderdale, petitioner cleared the first customs checkpoint. *Id.* at 4a-5a. In the secondary screening area, petitioner came to the attention of a senior Customs Service inspector—respondent Cheryl Friedland. *Id.* at 5a. Inspector Friedland noted that petitioner had no checked luggage, was attempting to quickly exit the Customs area, was traveling alone, was avoiding eye contact, and was pregnant—a fact made relevant by smugglers' practice of using pregnant wo-

men as drug couriers because they cannot be x-rayed. *Ibid.* Inspector Friedland called out to petitioner. *Ibid.* Even though petitioner was less than five feet away from Inspector Friedland, she did not stop. *Ibid.* Inspector Friedland caught up with petitioner and escorted her to a screening area for questioning. *Ibid.*

Petitioner had significant difficulty in answering routine questions about her trip and exhibited signs of nervousness. Pet. App. 5a-6a. Petitioner was avoiding eye contact, breathing heavily, sweating profusely, and holding on to an x-ray machine to avoid shaking. *Id.* at 5a. Based on her training and experience, Inspector Friedland identified petitioner's behavior and demeanor as indications that she was carrying contraband. *Ibid.*

Although petitioner contended that the purpose of her trip was to visit her husband, who lives in Jamaica, petitioner could not recall his address or phone number. Pet. App. 6a. When asked who purchased her plane ticket—bought only four days prior to the trip—petitioner first said that she did not know, and then said that a man named Osmond had done so, but that she did not know his last name. *Ibid.* Inspector Friedland considered these answers significant, because "internal narcotics smugglers often take short trips to limit expenses and increase the overall profitability of their trip," and "third-party booking * * * is a familiar method smugglers employ to avoid revealing their identity." *Id.* at 6a-7a.

When asked whether she was employed, petitioner stated that she worked for Office Depot. Pet. App. 6a. But when Inspector Friedland called the number that petitioner provided for that employer, it had been disconnected. *Ibid.* "Customs trains its inspectors to take note when persons provide unverifiable employment

information, as narcotics smugglers are often unable to provide such specific information." *Id.* at 7a.

Inspector Friedland searched petitioner's belongings, which consisted of a manila folder, purse, and small carry-on bag. Pet. App. 7a. Petitioner had in her possession two $100 bills, an affidavit of citizenship (in lieu of a passport), and a tablet with handwritten information about her husband "that appeared to be a cover story written for [her] by a third party." *Ibid.* The tablet read:

> Richard Scott—Poultry Farmer Since 1994
>
> Lives @ Belfast Near Morant Bay in the Parish of Saint Thomas
>
> His birthday is: Feb. 17th (Born 1972)
>
> *How you met.*
>
> Dec. 1995 A friend invited you to Jamaica while there went to the beach Dunns River met him there
>
> Dec. 1996 He visited you at your friends Saint Anne home you invited him at his Saint Thomas home
>
> * You had no prior knowledge of him
>
> You returned home to Florida—Telephone Exchange
>
> * Always used calling cards—Price Reasons
>
> March 1996 You went down to visit him in Jamaica.
>
> Oct. 1996 You went back to marry him
>
> * His phone number written down at home 809 something
>
> You are not good with remembering numbers.
>
> * NOT HIS PHONE ANYWAY Neighbors' Phone.

> ANY OTHER Questions Just answer something in that case try to remember what you were asked and what you answered.
>
> * DOES HE HAVE RELATIVES OR FRIENDS IN THE U.S. THAT YOU KNOW OF—NO—

Id. at 8a-9a. Petitioner stated that she did not know who wrote the script. *Id.* at 9a. Inspector Friedland asked petitioner to write down the answers to her questions so she could compare the handwriting to that on the script; the handwriting samples did not match. *Id.* at 9a n.8.[2]

Inspector Friedland then searched for information concerning petitioner in the Treasury Enforcement Communications System (TECS), a database that identifies persons who are suspected of terrorism, narcotics trafficking, money laundering, probation violations, or who have outstanding warrants. Pet. App. 9a-10a & n.9. TECS returned a lookout notification for petitioner, which stated:

> REFER TO CUSTOMS FOR ENFORCEMENT EXAM. ACQUIRED TRAVEL DOCUMENTS SHORTLY BEFORE DEPARTURE. MATCHES HI RISK NARCO-TARGETING INDICATORS. (IF ARRIVING FROM A SOURCE COUNTRY).

Id. at 10a. This alert had been entered in November 1996, and for 90 days thereafter would have required a Customs agent at the primary screening checkpoint to refer petitioner for a secondary screening like the one Inspector Friedland conducted. *Ibid.* While the mandatory screening period expired two weeks prior to peti-

---

[2] At trial, petitioner testified that Osmond—the man who bought her ticket—wrote this script for her. Pet. App. 9a n.8, 86a.

tioner's trip, the lookout remained in the TECS system for a year and was displayed when Inspector Friedland entered petitioner's name and date of birth. *Ibid.*

Inspector Friedland asked petitioner further questions, which she continued to have difficulty answering. Pet. App. 10a. Petitioner told Inspector Friedland that she had traveled to Jamaica with a friend named Shelita Jacobs. *Ibid.* Inspector Friedland was unable to confirm in a computer database that Jacobs had been traveling with petitioner. *Ibid.* Petitioner also stated that she had visited a friend named Coreen in Jamaica, but could not provide this friend's last name. *Ibid.* At this point, "based on her twenty-one years of experience as a Customs inspector, [Inspector] Friedland concluded that [petitioner] was likely carrying narcotics inside her body." *Ibid.*

Shortly after Inspector Friedland completed her questioning, petitioner asked to use the bathroom. Pet. App. 11a. With her supervisor's approval, Inspector Friedland patted petitioner down prior to the bathroom visit. *Ibid.* As required by Customs policy, Inspector Friedland and a female colleague monitored petitioner while she used the restroom and, when she finished, inspected the toilet paper, the contents of the toilet, and petitioner's undergarments. *Ibid.* No contraband was found. *Ibid.* Inspector Friedland then placed petitioner in handcuffs and read her *Miranda* rights. *Ibid.*

Inspector Friedland obtained approval from respondent Lee Lavenka, who was a Supervisory Customs Inspector and the Acting Port Director, to transport petitioner to Jackson Memorial Hospital as a suspected internal narcotics courier. Pet. App. 11a-12a. Based on the totality of facts gathered and reported by Inspector Friedland, Inspector Lavenka believed there was a rea-

sonable basis to detain and search petitioner to determine whether she was smuggling narcotics internally. *Ibid.*

At the hospital, petitioner was asked for a urine sample to confirm her pregnancy. Pet. App. 12a. She was then asked to lie on a hospital bed, to which she was handcuffed. *Ibid.* An obstetrician performed a pelvic examination and an ultrasound on petitioner to check on her pregnancy. *Ibid.* Hospital staff did not find any drugs when conducting those examinations, but that did not rule out the possibility that petitioner was smuggling drugs in her digestive tract. *Id.* at 12a-13a. Because petitioner's pregnancy prevented doctors from conducting an x-ray examination, she was held for additional monitoring of her bowel movements. *Id.* at 13a. Under a policy established by the hospital and the Customs Service, petitioner would be released once she passed three drug-free stool samples. *Ibid.* In order to help induce the bowel movements, a doctor prescribed a laxative called GoLytely. *Ibid.* Petitioner drank the laxative, had three drug-free bowel movements, and then was transported from the hospital back to the airport to retrieve her belongings. *Id.* at 13a-14a.[3]

---

[3] Contrary to her assertion (Pet. 2, 7, 16), petitioner was not forced to drink the laxative. In her supplemental court of appeals brief, petitioner stated that she "drank the [laxative] in order to put an end to her ordeal." Pet. App. 77a n.3 (quoting brief).

Petitioner also contends (Pet. 2-3) that she had a high-risk pregnancy and that the hospital staff ignored her complaints of abdominal pains and bleeding. Petitioner cites no evidence in the record in support of her allegations, and the record in fact dispels the allegations. At trial, Inspector Friedland testified that she did not recall hearing the doctor who conducted the pelvic exam use the words "high risk"; that petitioner informed Inspector Friedland that she had experienced bleeding two days *prior to* her trip to Jamaica; and that Inspector

2. Petitioner brought suit in federal district court on behalf of herself and her son, petitioner Jordan L. Taylor, who was *in utero* at the time of the events here. Pet. App. 14a. They sued the United States, Inspector Friedland, Inspector Lavenka, and other Customs Service and hospital officials. *Id.* at 14a-15a. As the court of appeals explained, petitioners' 11-count complaint "is a prolix, discursive pleading that combines causes of action and theories of recovery in such a way as to make it exceedingly difficult, if not impossible, to grasp precisely the claims being asserted." *Id.* at 15a-16a. But only two of petitioners' claims are at issue here: the claim that Inspectors Friedland and Lavenka (the individual respondents) violated petitioners' Fourth Amendment rights and therefore are liable under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and a claim against the United States for violations of state tort law actionable under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. See Pet. App. 15a-23a (explaining how petitioners' other claims were resolved).

Respondents and the hospital defendants moved for summary judgment. Pet. App. 21a-23a. As relevant here, the district court denied the individual respondents' request for qualified immunity on petitioners' *Bivens* claim; construing the facts in the light most favorable to petitioners, the court could not find, as a matter of law, that Inspector Friedland had sufficient particularized suspicion to justify searching petitioner in the airport bathroom or transporting her to the hospital

---

Friedland, who had four prior pregnancies herself, made sure that the doctors were aware of petitioner's complaints. 98-7256 Tr. 31-34 (S.D. Fla. Apr. 19, 2005) (docket entry 376).

for further examination. 98-7256 Order 19-22 (S.D. Fla. Jan. 29, 2002) (docket entry 217).

The court of appeals affirmed the denial of qualified immunity in an unpublished, per curiam opinion. Pet. App. 119a-124a. Based upon the record developed to that point, and construing the disputed facts in petitioners' favor, the court found "no error in the district court's denial of the federal defendants' motion for summary judgment or its determination that the federal defendants were not entitled to qualified immunity." *Id.* at 122a.

3. The case proceeded to trial, with the *Bivens* claims being tried to a jury, and the FTCA claims being tried before the district court (as required by 28 U.S.C. 2402). Pet. App. 26a. At the close of all of the evidence, the district court ruled on both the FTCA claims and the *Bivens* claim from the bench. *Id.* at 27a-28a. The court later memorialized its findings of fact and conclusions of law in written orders. *Id.* at 78a-118a (FTCA claims); App., *infra*, 1a-23a, 24a-49a (*Bivens* claim).

The district court entered judgment for the United States on petitioners' FTCA claims. Pet. App. 28a. The court noted that these claims must be assessed under Florida tort law. The court determined that, under Florida law, petitioners' claim for invasion of privacy fails because that tort covers invasions of places—not body parts. *Id.* at 99a (citing *Allstate Ins. Co.* v. *Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003)). Further, the court explained that for each of the other torts petitioners alleged—assault and battery, false imprisonment/false arrest, and intentional infliction of emotional distress—there is an exception under which "law enforcement officers acting within the scope of their employment are

privileged to use reasonable force to arrest or apprehend criminal suspects." *Id.* at 96a (collecting authorities); see *id.* at 97a, 98a. Accordingly, the court concluded that so long as the individual respondents acted with the requisite level of suspicion under the Fourth Amendment, they could not be liable for these torts. *Id.* at 96a-99a, 116a-117a.

The court evaluated each of the searches and detentions that took place. Pet. App. 100a-116a. The court first concluded that Inspector Friedland's questioning and pat-down search at the Fort Lauderdale International Airport were *per se* reasonable, because no suspicion is required for routine searches at Customs checkpoints. *Id.* at 100a-102a (citing, *inter alia*, *United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985)). The court then held that the inspectors' actions were reasonable with respect to the search of petitioner in the airport bathroom and her transportation to the hospital and detention there. The court explained that the Customs inspectors had "overwhelming reasonable suspicion" that petitioner was carrying narcotics internally, based on the facts that (1) petitioner arrived from a source country after a very short stay carrying no luggage except for a purse and a handbag; (2) could not provide any specific information—including the last name—of the person who had bought her ticket only four days prior to her trip; (3) made several short trips to Jamaica during the prior year; (4) was unable to provide an address or telephone number for her husband, who she claimed to be visiting; (5) could not present verifiable employment information; (6) was flagged in the TECS system as a potential drug courier; (7) was carrying an "extraordinarily peculiar script" that "appeared to be a cover story written for [petitioner] by a third

party"; (8) was traveling with "a travel document that experienced inspectors had not previously seen and did not know that one could travel with to Jamaica"; (9) was pregnant, which is known to be common for drug couriers; and (10) exhibited signs of nervousness. *Id.* at 106a-113a. Once this suspicion was established, Customs inspectors could constitutionally detain petitioner until nature took its course. *Id.* at 106a-107a (collecting authorities). "[A]s a matter of law," the court reasoned, "Customs officials had reasonable suspicion to justify each non-routine search of [petitioner]," and therefore "[petitioner's] claims under the Federal Tort Claims Act must necessarily fail." *Id.* at 116a; see *id.* at 116a-117a. Because petitioner Jordan Taylor was *in utero* at the time these events occurred, the court determined that his claims failed for the same reason. *Id.* at 79a n.1, 117a n.11.

The court then granted judgment as a matter of law to the individual respondents on the *Bivens* claim. Pet. App. 28a-29a; see App., *infra*, 1a-23a, 24a-49a (orders on *Bivens* claim).[4] The court concluded that its FTCA judgment barred the *Bivens* claim under the FTCA judgment bar, 28 U.S.C. 2676, which provides that the judgment in an action under the FTCA "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the

---

[4] The court considered only petitioner Denson's constitutional claim, because it had previously held, at the summary judgment stage, that "because Taylor was a fetus at the time of the events in question, he was not a 'person' or a 'citizen' under the Constitution, and therefore, had no constitutional rights at that time." 98-7256 Order 13 (S.D. Fla. Jan. 29, 2002) (docket entry 217). Petitioner has not challenged that ruling.

claim." See Pet. App. 28a, 31a. The court explained that the *Bivens* claim was barred by the plain terms of the judgment bar, because the statute's preclusive effect is triggered by an FTCA judgment so long as the FTCA claim and the *Bivens* claim concern the same subject matter. App., *infra*, 18a-22a.

The district court also ruled in the alternative that the individual respondents were entitled to qualified immunity on petitioner's *Bivens* claim. App., *infra*, 37a-48a. The court rejected petitioners' argument that it should deny judgment as a matter of law on the *Bivens* claim because it had previously denied respondents' motion for summary judgment, explaining that a court confronted with different evidence at trial is free to reach a different conclusion. *Id.* at 35a-37a (citing cases). Then, construing the evidence in the light most favorable to petitioner, *id.* at 35a, the court concluded that the individual respondents did not violate petitioner's Fourth Amendment rights because they had reasonable suspicion at each stage of the encounter that petitioner was smuggling drugs internally, *id.* at 37a-48a. The court explained that no reasonable factfinder could conclude that a Customs officer presented with the same facts lacked arguable reasonable suspicion. *Id.* at 40a-49a. Because it had concluded that the individual respondents were entitled to judgment as a matter of law on the *Bivens* claim, the court dismissed the jury. App., *infra*, 22a; 98-7256 Tr. 57-59 (S.D. Fla. Apr. 22, 2005) (docket entry 374).

4. The court of appeals affirmed. Pet. App. 1a-77a. The court first considered petitioner's *Bivens* claim. *Id.* at 38a-54a. After exhaustively reviewing the evidence, the court concluded that the individual respondents were entitled to qualified immunity because they did not

violate petitioner's Fourth Amendment rights. *Id.* at 40a-54a. The court explained that the routine questioning and pat-down search at the border "do not offend the Fourth Amendment" because no reasonable suspicion is required to conduct such searches at points of entry. *Id.* at 44a-45a. And the panel concluded that the totality of circumstances surrounding petitioner's arrival and answers to questioning made it "eminently reasonable for [Inspector] Friedland, especially given her experience and training, to suspect that [petitioner] was concealing contraband." *Id.* at 49a. This reasonable suspicion was sufficient to allow the federal defendants to "legally detain [petitioner] for 'the period of time necessary to either verify or dispel the suspicion,' including transporting [petitioner] to the hospital for a pelvic exam and, if necessary, monitored bowel movements." *Id.* at 51a (quoting *Montoya de Hernandez*, 473 U.S. at 544). The court rejected the notion that it was upholding the searches and detention based on "nothing more than a classic drug courier profile": here, not only had petitioner arrived from a known source country after a very short trip and carrying no luggage, but she could not answer basic questions about her trip, her husband, and her employment, and she was carrying a highly suspicious "cover story" written by someone else that appeared to provide answers to questions routinely asked by federal authorities. *Id.* at 48a-50a, 52a n.64.

The court then turned to petitioners' FTCA claims. The court noted that where, as in this case, a plaintiff's constitutional claims under *Bivens* fail, the United States may have two defenses under the FTCA. It may assert that the officers' conduct fell within the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), or it may assert that the Supremacy Clause

bars the application of state tort law that would impede the officers' performance of their federal duties. Pet. App. 54a. The court relied on the latter rationale, and therefore did not address whether the discretionary function exception also barred liability under the FTCA. See *id.* at 35a-36a, 54a, 58a-65a.

The court reasoned that because States may not prosecute federal officials under state criminal law for acts performed within the scope of their federal employment, "state law liability * * * cannot attach to the acts taken by federal officers in the course of their duties and committed in compliance with federal law," where—as here—"such action was 'no more than what was necessary and proper for [the officer] to do' under the circumstances, if application of state law would impede an essential federal function." Pet. App. 54a-65a (quoting *In re Neagle*, 135 U.S. 1, 75 (1890)). The court rejected petitioner Taylor's claims for the same reason, explaining that although a child injured *in utero* who is born alive has an independent cause of action against an alleged tortfeasor under Florida law, his claims are entirely derivative of his mother's because he has no independent argument for why respondents' actions were unlawful. *Id.* at 14a n.18.

Judges Carnes concurred in the judgment. Pet. App. 66a-77a. Judge Carnes agreed with his colleagues' rejection of the *Bivens* claim on the ground that no Fourth Amendment violation occurred. *Id.* at 77a. On the FTCA claims, Judge Carnes agreed that petitioners' claims failed, but for different reasons. *Id.* at 69a-70a. First, he noted that, as petitioners pleaded the FTCA claim, it depended on their contentions that the Customs officers' actions violated their constitutional rights. *Id.* at 69a. Because the court found no constitutional viola-

tions, the FTCA claims, as petitioners presented them, necessarily fail. *Ibid.*

Second, in Judge Carnes' view, there could be no tort liability under Florida law because Florida law contains a justification defense that "frees law enforcement officers from liability for actions reasonably taken in pursuit of their duty to enforce the law." Pet. App. 69a (citing *City of Miami* v. *Sanders*, 672 So. 2d 46, 47 (Fla. Dist. Ct. App. 1996)). That defense applies here, he explained, because "the customs inspectors' actions—all the way through the final monitored bowel movement search in the hospital—were justified because the facts, taken as a whole, supported their reasonable suspicion that [petitioner] was carrying drugs in her digestive tract, and that suspicion was not allayed until after the bowel movement search." *Id.* at 74a; see *id.* at 72a-77a.

5. Petitioners filed a petition for rehearing, with a suggestion for rehearing en banc. The court of appeals denied the petition, with no judge in regular active service calling for a vote on the petition. Pet. App. 128a.

ARGUMENT

Petitioners contend (Pet. 5-17) that the district court erred in granting the individual respondents qualified immunity on the *Bivens* claim and in entering judgment for the United States on the FTCA claims. The court of appeals' judgment is correct, and the decision below does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

1. The court of appeals correctly affirmed the district court's rejection of petitioner's *Bivens* claim. The district court reviewed the evidence carefully and concluded that the individual respondents' did not violate

petitioner's Fourth Amendment rights. App., *infra*, at 37a-48a. The court of appeals agreed. Pet. App. 38a-54a. The court explained that qualified immunity shields "[g]overnment officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established rights of which a reasonable person would have known." *Id.* at 39a (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)) (brackets in original); see, *e.g.*, *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (qualified immunity bars claims against government officials unless "it would be clear to a reasonable officer that [the] conduct was unlawful in the situation he confronted").

Here, the court explained, there was no Fourth Amendment violation at all. As the court of appeals recognized, "[w]hether a search or seizure is constitutionally reasonable is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" Pet. App. 40a (quoting *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). Courts "look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing," and must "allow[] officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *United States* v. *Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981)).

The court of appeals analyzed each search or detention and concluded that each was supported by a sufficient level of particularized suspicion. Pet. App. 40a-54a. The court found it "eminently reasonable" based

on all of the facts "for [Inspector] Friedland, especially given her experience and training, to suspect that [petitioner] was concealing contraband," *id.* at 49a, and Inspector Friedland therefore was justified in "detain[ing] [petitioner] for 'the period of time necessary to either verify or dispel the suspicion,' including transporting [petitioner] to the hospital for a pelvic exam and, if necessary, monitored bowel movements," *id.* at 51a (quoting *Montoya de Hernandez*, 473 U.S. at 544)).

Inspector Friedland's decision to stop petitioner, perform a pat-down search, and question her was constitutional. No particularized suspicion is required for such routine searches at the nation's border or upon entry to one of its international airports. *Montoya de Hernandez*, 473 U.S. at 537. Moreover, after petitioner's initial questioning, Customs inspectors had reasonable suspicion to further detain petitioner as a suspected internal narcotics courier. The totality of the circumstances here, viewed in light of Inspector Friedland's 20 years of experience as a Customs inspector, justify these searches. Petitioner was traveling without luggage; her trip lasted less than two days; she was returning from Jamaica, a source country for narcotics; she had previously taken multiple short trips to Jamaica; she was unable to provide her husband's address or phone number even though she claimed to have been visiting him; her ticket was purchased by a third party whose last name she did not know; she was pregnant, and pregnant women have increasingly been used as drug couriers; the TECS system registered an alert that petitioner should be considered high risk for narcotic trafficking if she was arriving from a source country; and she was carrying a script with questions and answers that was highly suspicious. Pet. App. 48a-49a.

Under the totality of the circumstances, those facts established sufficient particularized suspicion for the searches and detentions that took place. *Id.* at 44a-51a (citing *Montoya de Hernandez*, *supra*; *United States* v. *De Montoya*, 729 F.2d 1369, 1371 (11th Cir. 1984); *United States* v. *Pino*, 729 F.2d 1357, 1359 (11th Cir. 1984); *United States* v. *Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir.), cert. denied, 469 U.S. 1088 (1984)).[5] Although petitioner asserts (Pet. 14) that her actions were "not at all suspicious," she does not attempt to demonstrate that the district court erred in granting judgment as a matter of law or respond to the cases cited by the court of appeals that upheld similar actions under similar facts. See Pet. App. 44a-51a.[6]

---

[5] Petitioners are wrong to contend (Pet. 3) that petitioner's search and detention were based on nothing more than "generalized drug courier profile allegations." As the court of appeals explained, not only was petitioner arriving from a known source country after a very short trip and carrying no luggage, but she could not answer basic questions about her trip, her husband, and her employment, and she was carrying a tablet of paper with a "cover story" for her to use with federal authorities. Pet. App. 48a-50a, 52a n.64.

[6] Petitioner contends (Pet. 15-16) that the court of appeals is "in conflict with other circuits" because the court did not "requir[e] an increasing level of suspicion to justify the increasing intrusiveness of searches." She is mistaken: the court of appeals recognized that there must be particularized suspicion tailored to each of the intrusions at issue, Pet. App. 40a, and it determined that each search or detention was justified based on the totality of the circumstances at the time, *id.* at 44a-54a.

Petitioner also contends (Pet. 4-5, 15) that the district court and court of appeals equated the search of a body with the search of a car. That is wrong. The court of appeals never made such an analogy. The district court's reference to the movie *The French Connection* was an offhand comment made at oral argument—not in any of the court's orders or opinions—to illustrate that confirming or dispelling suspicion that an

Instead, petitioner contends (Pet. 11-13) that the district court was precluded from even addressing qualified immunity at trial because the courts had denied qualified immunity at the summary-judgment stage. As an initial matter, whether the summary-judgment ruling was the law of the case is a fact-specific determination on which petitioner does not claim any disagreement in the circuits, and review should be denied on that basis. In any event, petitioner is mistaken. Petitioner has acknowledged (Pet. C.A. Br. 41) that a court is permitted to reconsider a qualified immunity defense at trial in a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, even though the court previously rejected a qualified immunity defense at the summary judgment stage. Indeed, circuit law refutes petitioner's claim (Pet. 12) that the district court's denial of summary judgment on qualified immunity here was "law of the case." See, *e.g.*, *Oladeinde* v. *City of Birmingham*, 230 F.3d 1275, 1289 (11th Cir. 2000) ("[T]he defendants were not precluded from asserting the qualified immunity defense throughout the proceedings as the facts developed."); *Swint* v. *City of Wadley*, 51 F.3d 988, 992 (11th Cir. 1995) ("Any qualified immunity defenses that do not result in summary judgment before trial may be renewed at trial, where the actual facts will be established."). This Court itself has recognized in an analogous context that "resolution of the immunity question may require more than one judiciously timed appeal." *Behrens* v. *Pelletier*, 516 U.S. 299, 309 (1996) (internal quotation marks omitted) (noting difference between legal standards for evaluating qualified immu-

---

individual is smuggling drugs internally requires searching hard-to-reach parts of his or her body.

nity defense on a motion to dismiss and a motion for summary judgment).

Petitioner suggests (Pet. 11-12) that the court of appeals was precluded from affirming the grant of qualified immunity because the facts supporting the qualified immunity determination were unchanged since the prior appeal. That is wrong. At the time the district court initially denied summary judgment on qualified immunity, it placed no weight on two key pieces of evidence available to the Customs inspectors: the suspicious script, and the TECS alert identifying petitioner as a potential drug courier. 98-7256 Order 19-21 (S.D. Fla. Jan. 29, 2002) (docket entry 217). After discovery and trial, however, the district court concluded that both of these factors were highly suspicious. It called the script "extraordinarily peculiar," and noted that it "appeared to be a cover story written for Plaintiff by a third party." Pet. App. 111a. Similarly, the court concluded that the TECS alert "is significant to inspectors in assessing whether the person entering the United States is importing illegal drugs." *Id.* at 109a. In light of these materially different and developed facts, nothing prevented the district court from reconsidering its previous denial of qualified immunity. Nor was the court of appeals estopped from finding these items, and the totality of the surrounding circumstances, equally suspicious. *Id.* at 49a, 72a-73a. Were it otherwise, courts would be required to view the evidence in the light most favorable to a plaintiff at the summary-judgment stage, and then would be unable to evaluate the evidence and reach a different conclusion at the trial stage.

Finally, even if there were any error on the qualified immunity determination, petitioner's *Bivens* claim would fail based on a separate ground. As the district

court explained, the judgment bar in the FTCA barred petitioner's *Bivens* claim. See App., *infra*, 18a-22a. The judgment bar, 28 U.S.C. 2676, provides that "[t]he judgment in an action under section 1346(b)," the jurisdictional provision of the FTCA, "shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." Because the United States was entitled to judgment on petitioners' FTCA claims, the district court correctly concluded that its judgment barred any further action by them against employees of the government concerning the same subject matter (the search and detention of petitioner). As the district court explained (App., *infra*, 4a-10a), the judgment bar applies whether the final FTCA judgment is rendered in favor of a plaintiff or the government, because "Section 2676 makes no distinction between favorable and unfavorable judgments—it simply refers to '[t]he judgment in an action under section 1346(b).'" *Farmer* v. *Perrill*, 275 F.3d 958, 963 (10th Cir. 2001). For that reason as well, further review of petitioner's *Bivens* claim is unwarranted.

2. The court of appeals also correctly affirmed judgment for the United States on petitioners' FTCA claims.

a. As the court of appeals correctly explained, the FTCA is "a waiver of sovereign immunity that permits an injured claimant to recover damages against the United States where a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred." Pet. App. 33a (quoting *Carlson* v. *Green*, 446 U.S. 14, 28 n.1 (1980) (Powell, J., concurring in the judgment)). Petitioners first contend (Pet. 5-8) that the court erred by characterizing petitioner Taylor's claim as derivative of his

mother's. But the court of appeals did no such thing. The court of appeals recognized that petitioner Taylor was able to bring his own claim under Florida law, but it determined that the claim failed for the same reason as his mother's claim and it therefore did not consider the question of what injuries either petitioner sustained. Pet. App. 14a n.18.

Because petitioner Taylor was a six-and-a-half-month-old fetus at the time of the search at issue, he had no argument independent from his mother that the individual respondents acted unreasonably, as would be required for his tort claims to succeed under Florida law. Cf. *Scales* v. *United States*, 685 F.2d 970, 974 (5th Cir. 1982) ("The treatment accorded his mother is inherently inseparable from the treatment accorded Charles as a fetus in his mother's body."), cert. denied, 460 U.S. 1082 (1983). Because petitioner Taylor and his mother were inherently inseparable for purposes of analyzing reasonable suspicion for the searches (even if, as petitioners suggest, their injuries can be analyzed separately), the individual respondents' reasonable suspicion that his mother was smuggling drugs internally extended to petitioner Taylor. On the basis of that suspicion, the individual respondents had legal authority to conduct the search, and the court of appeals properly rejected petitioner Taylor's tort claims as derivative of his mother's tort claims.

Contrary to petitioners' contention (Pet. 6), there is no disagreement on the circuits on this point. Like the cases petitioners cite (*ibid.*), the court of appeals here recognized that "local law governs whether a claim is

derivative." Pet. App. 14a n.18.[7] And contrary to petitioners' suggestion (Pet. 6-7), the court specifically recognized that "[u]nder Florida law, a child who suffers prenatal injuries and is born alive has an independent cause of action against the alleged tortfeasor." Pet. App. 14a n.18.[8] But because the court found against petitioners on the dispositive issue of *liability*, it had no need to address whether they suffered separately compensable *injuries*. *Ibid.* There is no error warranting this Court's review.

b. Petitioners also contend (Pet. 8-11) that the court of appeals erred in affirming judgment for the United States on the FTCA claims. The court's conclusion was correct.

The Federal Tort Claims Act waives the government's sovereign immunity for "injury or loss of property * * * caused by the negligent or wrongful act

---

[7] None of the cases petitioners cite (Pet. 6) from other courts of appeals address the situation of a child allegedly injured when *in utero* and then born alive. Instead, they address a survivor's claim for wrongful death of a family member, where the survivor was alive at the time of the death. See *Schwarder* v. *United States*, 974 F.2d 1118, 1122 (9th Cir. 1992); *Fisk* v. *United States*, 657 F.2d 167, 171-172 (7th Cir. 1981); *Montellier* v. *United States*, 315 F.2d 180, 185-186 (2d Cir. 1963).

[8] That holding is fully consistent with *Del Rio* v. *United States*, 833 F.2d 282, 286-288 (11th Cir. 1987), and even if it were not, an intra-circuit disagreement would not furnish a basis for this Court's review. *E.g.*, *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). The other cases petitioners cite (Pet. 6 n.1) do not address whether a child who suffered injuries while *in utero* and then was born alive has a separate cause of action for his injuries. See *R.J.* v. *Humana of Fla., Inc.*, 652 So. 2d 360, 363 (Fla. 1995); *Champion* v. *Gray*, 478 So. 2d 17, 19-20 (Fla. 1985); *Metropolitan Life Ins. Co.* v. *McCarson*, 467 So. 2d 277, 278 (Fla. 1985); *Agency for Health Care Admin.* v. *Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1252 (Fla. 1996), cert. denied, 520 U.S. 1115 (1997).

or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b). To establish liability under the FTCA, a claimant must show that a private person would be liable for the same acts under state law. See 28 U.S.C. 1346(b), 2674.

As the court of appeals recognized, petitioners' FTCA claim depends on whether they could recover for the alleged torts—assault and battery, false imprisonment/false arrest, and intentional infliction of emotional distress—under Florida law. Pet. App. 33a. As the district court and the concurring judge on the court of appeals correctly concluded, petitioners' FTCA claims fail under state law because Florida law recognizes a defense to each of the torts alleged for actions that are privileged by law. *Id.* at 69a (Carnes, J., concurring); *id.* at 96a (district court).[9] Thus, so long as the individual respondents acted with the level of reasonable suspicion required by the Fourth Amendment, plaintiffs cannot establish that their acts were tortious. *Id.* at 96a-99a, 116a-117a. As explained *supra*, pp. 16-18, the individual respondents acted reasonably at each

---

[9] See, *e.g.*, *O'Brien* v. *Food Fair Stores, N. Dade, Inc.*, 155 So. 2d 836 (Fla. Dist. Ct. App. 1963) (law enforcement officers acting within the scope of their employment are privileged to use reasonable force to arrest or apprehend criminal suspects); *Harris* v. *Lewis State Bank*, 436 So. 2d 338, 341 (Fla. Dist. Ct. App. 1983) (false imprisonment or arrest require that the imprisonment or restraint be "unlawful" and "unreasonable and unwarranted under the circumstances"); *Metropolitan Life Ins. Co.*, 467 So. 2d at 278-279 (citation omitted) (intentional infliction of emotional distress does not apply to conduct that is "privileged under the circumstances").

stage of the search and detention, and there was no Fourth Amendment violation.

On appeal, petitioners did not challenge the district court's legal conclusion that, so long as the individual respondents were acting reasonably under the Fourth Amendment, the United States is not liable to them under Florida law and therefore under the FTCA. Instead, petitioners argued (C.A. Br. 27-36) that the restroom and hospital searches were not supported by reasonable suspicion. The court of appeals rejected that fact-bound argument, and petitioners have not demonstrated that any of the district court's factual findings were clearly erroneous or that the court of appeals erred in its legal conclusion, which was based on numerous decisions in which courts have upheld similar actions under similar facts. See pp. 16-18, *supra*. For that reason, petitioners' FTCA claims must fail.

c. The court of appeals held that petitioners' FTCA claims are barred by the Supremacy Clause. We agree with the court's premise that Congress could not have intended that the United States would be held liable for the actions of its law enforcement officers that were constitutional and within the scope of their official duties, because such conduct would ordinarily be privileged. In an action under the FTCA, however, that protection for the actions of law enforcement officers, irrespective of the Supremacy Clause, is located in the FTCA itself. In this case, the officers' actions were privileged as a matter of state law. Because there is no liability under state law, there is no need to consider whether liability is precluded as well on other grounds under the FTCA, such as the discretionary function exception in 28 U.S.C. 2680(a) (a ground the court of appeals did not reach, see Pet. App. 54a) or principles im-

plicit in the FTCA and derived from other privileges or immunities of federal officers from the application of state law. Although the court of appeals did not analyze the issue in that way, any error would be irrelevant to the disposition of this case. After all, both the district court's state-law holding (see also *id.* at 69a-70a (Carnes, J., concurring)) and the panel majority's Supremacy Clause rationale share the same fundamental premise: the individual respondents cannot be liable because they were acting reasonably in conducting their official duties. *Id.* at 54a-55a, 63a. As explained above, petitioners' claim must fail because they have not shown that the search and detention were unreasonable. Indeed, as also noted above, petitioners did not challenge on appeal the district court's legal conclusion that the United States is not liable under the FTCA if the officers' conduct was reasonable under the Fourth Amendment and thus consistent with Florida law. See p. 25, *supra*.

Petitioners do not identify any other court of appeals that has expressly addressed the argument whether a FTCA claim may be barred because the imposition of liability under state law would violate Supremacy Clause principles. Instead, they cite (Pet. 9-10) other cases that stand for the proposition that FTCA liability generally depends on the law of the place where the allegedly tortious acts occurred.[10] The court of appeals

---

[10] See *FDIC* v. *Meyer*, 510 U.S. 471, 477-478 (1994); *Dalrymple* v. *United States*, 460 F.3d 1318, 1326-1327 (11th Cir. 2006); *Ochran* v. *United States*, 273 F.3d 1315, 1317 (11th Cir. 2001); *Johnson* v. *Sawyer*, 47 F.3d 716, 727-729 (5th Cir. 1995); *Friedman* v. *United States*, 927 F.2d 259, 261-262 (6th Cir. 1991); *Caban* v. *United States*, 728 F.2d 68,

did not dispute that point. Indeed, it agreed with that proposition, Pet. App. 33a; see also *id.* at 68a (Carnes, J., concurring), but held that if Florida law imposed liability in this particular situation, it would be barred by a federal privilege in the particular circumstances of this case. *Id.* at 54a-65a (citing *In re Neagle*, 135 U.S. 1, 75 (1890)). Because there is no disagreement in the circuits on this point, and because Florida tort law itself compels judgment for the respondents by recognizing a privilege for the challenged conduct, there is no reason for this Court to consider petitioners' fact-bound claims. Further review is therefore unwarranted.

72-74 (2d Cir. 1984); *Birnbaum* v. *United States*, 588 F.2d 319, 327-328 (2d Cir. 1978); see also 28 U.S.C. 1346(b).

Petitioners contend (Pet. 9) that there is "a conflict between and within the circuits as to whether the government's liability" under 28 U.S.C. 2680(h) "is to be analyzed under federal or state law." Section 2680(h) makes the United States liable for "acts or omissions of investigative or law enforcement officers of the United States Government" constituting "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. 2680(h). Petitioners' citations are inapposite, because the court of appeals did not rely on the law enforcement proviso in Section 2680(h) or state that federal law defines its scope; as explained *supra*, pp. 24-26, the court recognized that state law applies but found that state law must yield under the Supremacy Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
BARBARA L. HERWIG
TEAL LUTHY MILLER
MICHAEL P. ABATE
Attorneys

MAY 2010

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 98-7256-CIV-MOORE

JANNERAL DENSON AND JORDAN L. TAYLOR, A MINOR, THOUGH HIS LEGAL GUARDIAN, JANNERAL DENSON, PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

[Filed: Aug. 22, 2005]

ORDER

THIS CAUSE comes before the Court after a four-day trial in Miami, Florida, from April 18, 2005, through April 21, 2005. Plaintiffs filed an action against the United States of America and against United States Customs Inspectors Cheryl Friedland and Lee Levanka (the "individual Defendants").[1] From the United States Plaintiff sought damages under the Federal Torts Claims Act ("FTCA") for circumstances surrounding her detention by United States Customs officials at the Ft. Lauderdale International Airport on February 14, 1997.

---

[1] Plaintiff voluntarily dismissed Senior Inspector Flynn following his direct trial testimony. Tr. Flynn, April 19 at 188.

From the individual Defendants Plaintiff sought damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), for violations of her constitutional rights arising out of the same facts. The FTCA action was tried to the bench while simultaneously the Bivens action was tried to a jury.

The Court, having heard four days of trial testimony, having reviewed the applicable pleadings, received evidence, and reviewed the applicable law found against Plaintiff and in favor of the United States in the Federal Tort Claims Act action.

Subsequently, the individual Defendants argued that because this Court had entered judgment on Plaintiff's FTCA action, Plaintiff's Bivens action was precluded by 28 U.S.C. § 2676. This Court agreed and dismissed the Bivens action.[2] The Court enters the following Order to that effect.

I. THE JUDGMENT BAR

The 28 U.S.C. § 2676 judgment bar provides that:

> The judgment in an action under section 1346(b) of this title [27 USCS § 1346(b)]
>
> shall constitute a complete bar to any action by the claimant by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2676.

---

[2] Alternatively, this Court found that if the judgment bar does not apply, the individual Defendants were nevertheless entitled to qualified immunity. The Court will address the qualified immunity issue by separate order.

Plaintiff contends that the judgment bar set forth in 28 U.S.C. § 2676 is not applicable to a Bivens action. Plaintiff argues that after the Supreme Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), Congress amended the FTCA with the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly referred to as the Westfall Act. 28 U.S.C. § 2679(b)(2)(A) ("The Westfall Act"). In enacting the Westfall Act, Plaintiff argues, Congress specifically exempted a Bivens action from the FTCA's § 2676 judgment bar.

The Westfall Act states in relevant part that:

> (b) (1) The remedy against the United States provided by sections 1346(b) and 2672 of this title [28 USCS §§ 1346(b) and 2672][3] for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's es-

---

[3] The Federal Torts Claims Act waived the United States Government's sovereign immunity for the torts of its employees by granting the federal district courts jurisdiction over suits for damages "caused by the negligent or wrongful act or omission of any employee of the Government." 28 U.S.C. § 1346(b).

> tate is precluded without regard to when the act or omission occurred.
>
> (2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—
>
> (A) which is brought for a violation of the Constitution of the United States, or
>
> (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

28 U.S.C. § 2679.

Plaintiff argues that this addition to the FTCA, which specifically states that the restriction barring additional actions "does not extend or apply to a civil action against an employee of the Government . . . which is brought for a violation of the Constitution of the United States," effectively removed Bivens actions from the purview of the FTCA and therefore the judgment bar does not apply to Bivens actions.

The Court agrees that the FTCA is no longer the exclusive remedy available to a plaintiff and that in fact a plaintiff may maintain a cause of action for both her Bivens claim and her FTCA claim.[4] In *Carlson v. Green*, the Supreme Court held that the FTCA was not the exclusive remedy for the intentional torts of federal law

---

[4] As the Court noted at the time that it upheld the application of the judgment bar, practical considerations may weigh in a plaintiff's decision as to whether to bring an action pursuant to the FTCA or Bivens, or both. An FTCA suit is non-jury and attorney's fees are limited to twenty-five percent (25%), but collection of the judgment is certain. A Bivens action, on the other hand, entitles a plaintiff to a jury trial and attorney's fees are not capped. However, collection of the judgment against individual federal employees is not as certain.

enforcement officers, stating that "victims of the kind of intentional wrongdoing alleged in the complaint shall have an action under FTCA against the United States as well as a Bivens action against the individual officers alleged to have infringed their constitutional rights." 446 U.S. 14, 20 (1980). *Carlson* relied on the fact that Congress views FTCA and Bivens as parallel, complementary causes of action.

The purpose of the Westfall Act, upon which Plaintiff relies, was to protect federal employees from the potential liability to which they were exposed as a result of the decision in *Westfall v. Erwin*, 484 U.S. 292 (1988). Prior to *Westfall v. Erwin*, federal employees were absolutely immune from personal liability for common law torts so long as they were acting within the scope of their employment at the time the injury occurred. *Westfall v. Erwin* decided that federal employees must have been acting within the scope of their employment and, in addition, must have been acting in the exercise of governmental discretion. 484 U.S. at 297-98. Congress responded to this erosion in government employee immunity with the Westfall Act.

The Westfall Act expanded the Federal Torts Claims Act to provide more protection for employees acting within the scope of their employment. Section 5 of the Westfall Act provides that an action against the United States is the exclusive remedy for injuries arising from "the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 2679(b)(1).

The Westfall Act also provided exceptions to a government employee's immunity from suit, including when an injured plaintiff brings a Bivens action seeking dam-

ages for a constitutional violation by a government employee. *See* § 2679(b)(2); *United States v. Smith*, 499 U.S. 160, 167 (1991).

Plaintiff's reliance, however, on the Westfall Act and *Carlson v. Green* as evidence that Congress did not intend the FTCA's judgment bar to apply to a Bivens action is misplaced. First, *Carlson*, unlike the case at bar did not involve a lawsuit brought as both an FTCA and a Bivens action. Thus, the Court did not address the question of whether a plaintiff could pursue both causes of action simultaneously or whether § 2676's judgment bar would apply should the plaintiff choose to do so. Second, with Section 5 of the Westfall Act, Congress made explicit that victims of constitutional violations would remain free to pursue a remedy against the individual employee if they chose to do so. *United States v. Smith*, 499 U. S. 160, 182 (1991). The Act, however, merely allowed for the two actions to proceed, where without the exception the only remedy that would be available to a plaintiff would be an FTCA action against the United States. While the Westfall Act amended the restrictions of bringing an action, it did not, either explicitly or implicitly, eviscerate the judgment bar that is contained in an entirely different section of the FTCA.

Moreover, Plaintiff's argument is not supported by case law. Plaintiff cites to cases that reaffirm a plaintiffs right to bring both an FTCA and Bivens action. However, not one of the cases to which Plaintiff cites deals with the application of the § 2676 judgment bar to a Bivens action in the event of an FTCA judgment. Yet such case law does exist, albeit not in this Circuit, in which courts have barred a subsequent Bivens action pursuant to the § 2676 judgment bar.

II. EXISTING CASE LAW INVOLVING THE JUDGMENT BAR[5]

In *Freeze v. United States of America, et al.*, 343 F. Supp. 2d 477 (M.D.N.C. 2004) *aff'd* 2005 U.S. App. LEXIS 9498 (4th Cir. May 24, 2005), the plaintiff asserted a claim for constitutional violations against individual defendants as well as an FTCA claim against the United States. The Court dismissed the plaintiff's FTCA claim because the plaintiff had not exhausted his administrative remedies. *Id.* at 481.

The Court additionally found, that judgment entered on the plaintiffs FTCA action prevented the plaintiff from asserting an action against the individual defendants based on a constitutional claim. *Id.* The Court held that the 28 U.S.C. § 2676 judgment bar applies to the constitutional claims against Federal employees based on the same conduct, regardless of the outcome of the underlying FTCA action. *Id.* (citing *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 184-85 (7th Cir. 1996) ("There is no indication that Congress intended Section 2676 to apply only to favorable FTCA judgments."); *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) ("'any FTCA judgment, regardless of its outcome, bars a subsequent Bivens action on the same conduct that was at issue in the prior judgment' ").

---

[5] Recently, in *Will v. Hallock*, 387 F.3d 147 (2nd Cir. 2004), the Supreme Court granted certiorari on a judgment bar issue. *Will v. Hallock*, ___ S. Ct. ___, 2005 WL 770286 (U.S. June 6, 2005) (No. 04-1332). One of the questions granted for review concerns whether dismissal of the FTCA case on jurisdictional grounds, would preclude a subsequent *Bivens* suit.

In *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986), the plaintiff sued the United States under the FTCA and brought a simultaneous Bivens action against the individual defendants, a prison warden and doctor. *Id.* at 238. The plaintiff obtained a judgment against the United States in the FTCA action and the prison doctor in the Bivens action. *Id.* The prison doctor appealed, arguing that the plaintiff's Bivens action was barred by § 2676. *Id.*

The Court held that § 2676 states that a judgment against the United States shall constitute a "complete" bar to "any" action by the claimant against the employee whose act or omission gave rise to the claim. *Id.* at 239. The court reasoned that the only limitation on the scope of this bar is that the actions must arise "by reason of the same subject matter." *Id.* Thus, the court stated, its decision depended on whether "by reason of the same subject matter" means (a) "on the same claim" or (b) "arising out of the same actions, transactions, or occurrences." *Id.*

In evaluating the meaning of "by reason of the same subject matter," the court looked to the language found in another section of the FTCA, 28 U.S.C. § 2672, dealing with the consequences of accepting a settlement from the government. *Id.* at 239.

> The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

Id. at 239 (citing 28 U.S.C. § 2672).

The court found that because 28 U.S.C. § 2672 mandates that the acceptance of a settlement constitutes a complete release of "any" claim against the employee (or the United States) by reason of the same subject matter, it is clear that the words "by reason of the same subject matter" were not intended to limit the scope of the release to the very claim that was settled. *Id.* at 240. The court concluded that the phrase "by reason of the same subject matter" in § 2676 should be given the same interpretation. *Id.* at 240. The court held that because the Bivens claim arose from the same actions that defined the FTCA claim, the Bivens action was barred. *Id.* at 241.

The plaintiff, in *Serra* argued that the Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), supported his argument that § 2676 only bars actions brought on the same claim that the plaintiff asserted against the government. *Id.* at 241. The *Serra* court held that the *Carlson* Courts imply found that a Bivens remedy is available to a plaintiff even though plaintiffs allegations also support a suit against the United States under the FTCA, whereas, the case before the *Serra* court dealt with the effect of an FTCA judgment on a plaintiffs power to continue to pursue a Bivens remedy. *Id.* The Court in *Carlson* did not address this issue. *Id.*

Finally, the *Serra* court held that it was inconsequential that the claims were tried together in the same suit and that the judgments were entered simultaneously. *Id.* (citing *Aetna Cas. & Sur. Co. v. United States*, 570 F.2d 1197, 1201 (4th Cir. 1978) ("a judgment against the United States would automatically bar the entry of any contemporaneous or subsequent judgment against [the

government employees]"); *Gilman v. United States*, 206 F.2d 846, 848 (9th Cir. 1953) ("the moment judgment was entered against the Government, then by virtue of § 2676 . . . the employee was no longer primarily answerable to the claimant,—he was no longer answerable at all") (footnote omitted), aff'd, 347 U.S. 507 (1954); *United States v. Lushbough*, 200 F.2d 717, 721 (8th Cir. 1952) ("The District Court, having awarded a judgment in favor of [plaintiff] in his action against the United States, could not in the face of the explicit provisions of the Act [section 2676] order judgment against [the government employee] in favor of [plaintiff] in the same action.")). Accordingly, the court held that plaintiffs judgment against the United States barred his action against the individual defendants. *Id.* at 242.

In *Hoosier v. Rasmussen*, the plaintiff brought an FTCA action against the United States. 90 F.3d 180, 182 (7th Cir. 1996). A few weeks later the plaintiff filed a Bivens action against the individual defendants for constitutional violations. *Id.* The district court entered judgment against the plaintiff in the FTCA action. *Id.* at 182-183. The district court subsequently dismissed the Bivens action as time barred and alternatively because it was precluded by the FTCA judgment. *Id.* at 184.

Interpreting the word "judgment" as applying to both judgments for and against the government, the district court held that the plaintiff's Bivens action was barred by the § 2676 judgment bar. *Id.* On appeal, the plaintiff argued that the judgment bar was inapplicable because the plaintiff recovered nothing on its FTCA action and the purpose of the judgment bar is to prevent dual recovery. *Id.*

The court, adopting the Ninth Circuit's reasoning in *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) held that there is no indication that Congress intended § 2676 to apply solely to FTCA judgments against the United States. *Id.* at 185. The *Hoosier* court joined the *Gasho* court's conclusion that "any FTCA judgment, regardless of its outcome, bars a subsequent Bivens action on the same conduct that was at issue in the prior judgment." *Hoosier*, 90 F.3d at 185 (quoting *Gasho*, 39 F.3d at 1437, 1438. (holding that the language of Section 2676 was neither "ambiguous" nor "vague," and suggested no distinction between judgments favorable and judgments unfavorable to the government")).

In *Clifton v. Miller, et al.*, 1998 U.S. App. LEXIS 2794 (7th Cir. February 9, 1998) (unpublished opinion) the plaintiff simultaneously brought an FTCA claim against the United States and a Bivens claim against the individual Defendants. *Id.* at *1. The plaintiff prevailed against the United States on his FTCA claim and against the individual defendants on his Bivens claim. *Id.* Following trial, the district court barred the Bivens judgment against the individual defendants pursuant to 28 U.S.C. § 2676. The plaintiff appealed.

Upon review, the court of appeals affirmed and held that because § 2676 operates as a "complete" bar to "any" action, it is inconsequential that the [Bivens and FTCA] claims were tried together in the same suit and that the judgments were entered simultaneously. *Clifton*, at *6 (citing *Serra v. Pichardo*, 786 F.2d 237, 241 (6th Cir. 1986)); *Ting v. United States*, 927 F.2d 1504, 1513 n.10 (9th Cir. 1991) ("[A] plaintiff may maintain both an FTCA and a Bivens action, [but] he may not

receive double recovery"); *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 185 (7th Cir. 1996) (holding that "any FTCA judgment, regardless of its outcome, bars a subsequent Bivens action on the same conduct that was at issue in the prior judgment.")).

In *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987) the plaintiff filed an FTCA action against the United States and a Bivens action against the individual defendant. *Id.* at 488. After a bench trial the court entered judgment against the United States and against the individual defendant. *Id.* The court, adopting the Sixth Circuit's reasoning in *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986) held that the Bivens action against the individual defendant was barred by the FTCA judgment entered against the United States.

The Court noted that unlike *Carlson v. Green*, in the case before the court the plaintiff sued both the United States under the FTCA and the individual federal officer under Bivens and obtained judgments against both. *Arevalo*, 811 F.2d 487 at 490. Moreover, the judgment against the government in the FTCA action was based upon the same conduct which gave rise to the Bivens action against the individual defendant. *Id.* The court held that under these circumstances, the mandate of § 2676 is clear. *Id.* The FTCA judgment bars the plaintiffs Bivens action against the individual defendant. *Id.* (citing 28 U.S.C. § 2676; *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986)).

The court noted that while the plaintiff might prefer the judgment against the individual defendant rather than the judgment against the government, it is too late for that choice. *Arevalo*, 811 F.2d at 490. The moment judgment was entered against the government, by virtue

of § 2676, the individual defendant was no longer answerable to the plaintiff for damages. *Id.* (citing *Serra*, 786 F.2d at 141; *Gilman v. United States*, 206 F.2d 846, 848 (9th Cir. 1953), affd, 347 U.S. 507 (1984); *Aetna Casualty and Surety Company v. United States*, 570 F.2d 1197, 1201 (4th Cir. 1978)).

In *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992) the Bivens claim was tried to the jury while the FTCA claim was tried to the court. *Id.* at 836. The jury found against the individual defendants on the Bivens claim and the court entered judgment for the United States on the FTCA claim. *Id.* The individual defendants filed a motion to vacate the judgment against them based on the judgment entered in the FTCA claim. *Id.* The court denied the motion and the defendants appealed. *Id.*

The question presented on appeal was whether § 2676 applies when the judgment on the FTCA claim (a) has become final contemporaneously with the judgment on a Bivens claim arising from the "same subject matter" and (b) has been favorable to the government. *Id.*

The court stated that although the language of the statute refers to a bar of "any action," it fails to resolve whether the bar applies to other claims raised in the same action. *Id.* The court found that Congress' primary concern in enacting the bar was to prevent multiple lawsuits on the same facts. *Id.* (citing Hearings Before the House Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 9 (1942) (statement of Francis Shea, Assistant Attorney General)). The court held that this concern is absent when suit is brought contemporaneously for FTCA and other relief. *Id.* at 838.

The court further distinguished between judgments favorable and judgments unfavorable to the government. The court held that the text of the statute "is ambiguous on the question of whether an FTCA judgment favorable to the government bars a contemporaneous Bivens judgment." *Id.* at 838. Thus, the court found that "it was free, in this narrow context, to consider the possibility that the quality of the FTCA judgment may have a bearing on its effect on contemporaneous judgments." *Id.* at 838.

In resolving this ambiguity, the court noted that the statutory bar was conceived by Congress primarily to prevent dual recoveries arising from additional, subsequent litigation. *Id.* at 838. The court found that there was no threat of dual recovery here because the plaintiff did not prevail on her FTCA claim and concluded that § 2676 does not preclude Bivens relief in this case. *Id.*

In *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994) the plaintiffs filed an FTCA action against the United States which was dismissed. The plaintiffs then filed a Bivens action against the individual defendants. *Id.* at 1425. The district court, reading the word "judgment"in § 2676 as applying to both judgments for and against the government, dismissed the Bivens action. *Id.* at 1436.

On appeal the plaintiff argued that the word judgment is vague and ambiguous about whether it applies to both judgments for and against the United States. *Id.* at 1437. The court disagreed. Looking at the plain language of the statute, the court held that the statute speaks of "judgment" and suggests no distinction between judgments favorable and judgments unfavorable to the government. *Id.* at 1437. The court held that the

language is not "ambiguous" or "vague." *Id.* (citing *Leaman v. Ohio Dept. of Mental Retardation*, 825 F.2d 946 (6th Cir. 1987) (interpreting Ohio Court of Claims Act and stating in dictum that similar provision in section 2676 provides that "even adverse judgments" in favor of the government bar subsequent recovery against employees)).

The court noted that in enacting this legislation, Congress was concerned with the prevention of dual recoveries and the prevention of multiple lawsuits. *Id.* at 1437 (citing Hearings on H.R. 5373 and H.R. 6463). The court held that the risk of dual recovery was absent because Plaintiff did not prevail in its FTCA action. *Id.* at 1437. The court further noted that Congress was concerned about the government's ability to defend subsequent suits against its employees. *Id.* The court found that Congress never intended to draw a distinction based on whether the government prevailed. *Id.* The court therefore held that any FTCA judgment, regardless of its outcome, bars a subsequent Bivens action on the same conduct that was at issue in the prior judgment. *Id.*

The court further explained that its interpretation of § 2676 serves the interests of judicial economy. "Plaintiffs contemplating both a Bivens claim and an FTCA claim will be encouraged to pursue their claims concurrently in the same action, instead of in separate actions. This will foster more efficient settlement of claims, since the evidence and proof in FTCA and Bivens claims often overlap." *Id.* at 1438.

In *Engle v. Mecke*, 24 F.3d 133 (10th Cir. 1994) the plaintiff sued the United States in an FTCA action and simultaneously sued the individual defendant in a Bivens

action. *Id.* at 134. The district court bifurcated the trial with the Bivens action submitted to the jury and the FTCA claims were retained by the court. *Id.* The jury awarded the plaintiff $351,646 against the individual defendant. *Id.* Based on the same evidence the district court awarded the plaintiff $28,300 in damages. *Id.* The court then vacated the jury's verdict and award on the ground that the FTCA judgment constituted a complete bar to the action against the individual defendant. *Id.*

On appeal, the Court of Appeals affirmed and explained the effect that a final judgment in an FTCA case has on a Bivens action based on the same underlying conduct.

> When a federal law enforcement officer commits an intentional tort, the victim has two avenues of redress: 1) he may bring a Bivens claim against the individual officer based on the constitutional violation, or 2) he may bring a common law tort action against the United States pursuant to the FTCA. These are separate and distinct causes of action arising out of the same transaction. A decision to sue the government, however, affects the availability of a Bivens action against the federal officer. Although the plaintiff may elect initially to bring his action against either defendant, a judgment against the United States under the FTCA constitutes "a complete bar to any action by the claimant, by reason of the same subject matter, against the employee . . . whose act or omission gave rise to the claim." 28 U.S.C. § 2676.

Engle, 24 F.3d at 135 (citations omitted) (ellipses in original).

In explaining why the judgment bar does not effectively deny a plaintiff his Seventh Amendment right to a jury trial, the court explained that

> [Plaintiff] had two separate and distinct causes of actions against two separate and distinct defendants. Had he chosen to seek his redress from the individual law enforcement officer, the jury verdict would have been given full effect and his Seventh Amendment rights would have been preserved. Because, however, he chose to seek redress from the United States government, he had no right to a jury's verdict. The United States, as sovereign, is completely immune from suit unless it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). It may, therefore, condition its consent on dispensation of a jury trial without offending the Seventh Amendment. *See id.* at 587. As [Plaintiff] had no Seventh Amendment right to a jury trial, the district court did not err in making independent factual findings instead of accepting the jury's award.

Engle, 24 F.3d at 135.

In *Farmer v. Perrill*, 275 F.3d 958 (10th Cir. 2001) the court held that because the plaintiff obtained an adverse judgment in her FTCA action based on the same alleged conduct, the Bivens action was barred by § 2676. *Id.* at 960. The plaintiff filed a Bivens action against various prison employees. *Id.* The district court denied the defendants motion for summary judgment in the Bivens action. *Id.* During the pendency of this lawsuit, judgment was entered in a separate lawsuit brought by the plaintiff against the United States pursuant to the FTCA seeking damages arising out of the same subject matter as the Bivens action. *Id.* The FTCA action was

dismissed with prejudice by the district court for failure to prosecute. *Id.* at 961. Subsequently, the defendants in the Bivens action moved for reconsideration of the order denying their motion for summary judgment arguing that § 2676 barred the Bivens action after judgment has been entered in the FTCA action. *Id.* The district court denied the defendants' motion for reconsideration and the defendants appealed. *Id.*

The court of appeals reversed and held that by its terms the judgment bar in § 2676 precludes plaintiffs from bringing a Bivens action regarding the same subject matter regardless of whether the final FTCA judgment is rendered in favor of a plaintiff or the government. *Id.* at 963. The court found that the phrase "by reason of the same subject matter" in § 2676 means" arising out of the same actions, transactions, or occurrences." *Id.* at 961 (citing *Serra v. Pichardo*, 786 F.2d 237, 239-40 (6th Cir. 1986)).

In *Trentadue v. United States*, 397 F.3d 840 (10th Cir. 2005) the individual defendants argued that the district court's entry of judgment on the plaintiff's FTCA claims required the court to vacate the judgment entered against him on the Bivens claims. The court of appeals agreed. *Id.* at 858-859.

The district court tried the plaintiff's FTCA and Bivens claims contemporaneously in a bifurcated proceeding. *Id.* at 858. The jury found the individual defendant liable for constitutional violations under Bivens. *Id.* The Court entered judgment on the Bivens claims before adjudicating the FTCA claim that was before it on a bench trial. *Id.*

In deciding whether the FTCA judgment bar applies to FTCA and Bivens actions brought simultaneously, the

Court noted that the plaintiffs' FTCA and the Bivens action arose out of the same "actions, transactions, or occurrences" for the purposes of § 2676. *Id.* at 858. The court found that the FTCA's judgment bar constitutes "a complete bar to any action" based on the same subject matter as the claimant's FTCA case. *Id.* (citing 28 U.S.C. § 2676). The court held that although the language of the statute does not speak to situations where FTCA and non-FTCA claims are tried together in the same action, § 2676 nevertheless applies. *Id.* at 859 (citing *Kreines v. United States*, 959 F.2d 834, 838 (9th Cir. 1992)). The court held that "contrary rule would permit plaintiffs to escape the judgment bar's preclusive effect in cases like this, where the district court waited to enter judgment on FTCA claims tried contemporaneously with Bivens claims. Such is not the intent of the rule." *Trentadue*, 397 F.3d at 858-859 (citing *Farmer*, 275 F.3d at 963 n.7 (Congress intended to prevent multiple lawsuits as well as multiple recoveries) (in turn citing *Hoosier Bancorp of Ind. v. Rasmussen*, 90 F.3d 180, 184 (7th Cir. 1996), and *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994))). The court further held that the fact that the district court entered judgment on the Bivens claims before issuing its order and judgment in the FTCA case is inconsequential under § 2676.

The court reiterated that the bar precludes a Bivens action regardless of whether the final FTCA judgment is rendered in favor of the plaintiff or the government. The only limiting factor on the bar is that the claims must have arisen "by reason of the same subject matter." The Court thus concluded that a final judgment in the FTCA action will bar the Bivens action against the individual defendant. Thus, upon entry of a final judgment in the FTCA action, the district court was directed

to dismiss the Bivens action against the individual defendants. *Trentadue*, 397 F.3d at 859.

III. THE INSTANT CASE

It is well established that "when the statute' s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U.S. 1, 6 (2000) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241(1989) (in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485(1917))). So we begin with the present statute as issue.

> The judgment in an action under section 1346(b) of this title [27 USCS § 1346(b)] shall constitute a complete bar to any action by the claimant by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2676.

In looking first to the language of this statute, this Court must answer two separate questions as to the judgment bar's application to the instant case. First, is the judgment bar applicable where judgment was entered in favor of the United States in the FTCA action? Second, is the judgment bar applicable where the Bivens and FTCA actions have been brought simultaneously?

There is no ambiguity as to whether the statute applies where the United States has prevailed on the FTCA claim. The language of the statute is plain. It bars any subsequent action where "[t]he judgment" has

been entered on the FTCA claim. The only limiting language in the statute is that the claims must have arisen "by reason of the same subject matter." In this case, the FTCA and Bivens actions "arose out of the same actions, transactions, or occurrences." Therefore, any judgment entered in the FTCA claim invokes the preclusive effect of the § 2676 judgment bar as to the Bivens action. *See Trentadue v. United States*, 397 F.3d 840 (10th Cir. 2005); *Farmer v. Perrill*, 275 F.3d 958 (10th Cir. 2001); *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180, 184-85 (7th Cir. 1996); *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) ("Because we have affirmed the district court's judgment in favor of the United States in the FTCA claims involving seizure of the aircraft, that prior judgment precludes any subsequent Bivens claim based on the seizures"); *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986); *Freeze v. United States of America, et al.*, 343 F. Supp. 2d 477 (M.D.N.C. 2004) aff'd 2005 U.S. App. LEXIS 9498 (4th Cir. May 24, 2005); *but see Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992).

This Court similarly finds that § 2676 bars a simultaneous Bivens action after judgment has been entered on the FTCA action. The plain language of § 2676 states that § 2676 is a bar to any action by the claimant regardless of whether they are brought simultaneously in one action. The statute does not make these distinctions and thus neither does this Court. The only distinction that the statute does make is that the actions must have arisen "by reason of the same subject matter." *Serra v. Pichardo*, 786 F.2d at 239-240. 28 U.S.C. § 2676 constitutes a "complete bar to any action" based on the same subject matter as Plaintiff's FTCA case. Although the language of the statute does not speak to situations

where FTCA and non-FTCA claims are tried together in the same action, by its plain language § 2676 nevertheless applies. *Trentadue*, 397 F.3d at 859 (holding that § 2676 constitutes a "complete bar to any action" based on the same subject matter as the claimant's FTCA case, even when tried simultaneously); *Clifton v. Miller, et al.*, 1998 U.S. App. LEXIS 2794 (7th Cir. February 9, 1998) (unpublished opinion) (finding it inconsequential that the FTCA and Bivens claims were tried in the same suit); *Engle v. Mecke*, 24 F.3d 133 (10th Cir. 1994) (same); *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986) (same) *but see Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992); *Gasho v. United States*, 39 F.3d 1420, 1437 (9th Cir. 1994). A contrary rule would permit plaintiff to escape from the judgment bar's preclusive effects—"[s]uch is not the intent of the rule." *Trentadue*, 397 F. 3d at 858-859.

V. CONCLUSION

Accordingly, based on the foregoing it is

ORDERED AND ADJUDGED that Plaintiff's Bivens action is DISMISSED as barred by 28 U.S.C. § 2676. The individual Defendants shall move for final judgment within ten (10) days from the date of this Order. This case is CLOSED.[6]

---

[6] By separate Order the Court will address the individual Defendants' qualified immunity.

DONE AND ORDERED in Chambers at Miami, Florida, this 22nd day of August, 2005.

/s/ K. MICHAEL MOORE
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: All counsel of record

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 98-7256-CIV-MOORE

JANNERAL DENSON AND JORDAN L. TAYLOR, A MINOR, THROUGH HIS LEGAL GUARDIAN, JANNERAL DENSON, PLAINTIFF(S)

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANT(S)

[Filed: Oct. 4, 2005]

THIS CAUSE comes before the Court after a four-day trial in Miami, Florida, from April 18, 2005, through April 21, 2005. Plaintiffs filed an action against the United States of America and against United States Customs Inspectors Cheryl Friedland and Lee Levanka (the "individual Defendants").[1] From the United States Plaintiff sought damages under the Federal Torts Claims Act ("FTCA") for circumstances surrounding her detention by United States Customs officials at the Ft. Lauderdale International Airport on February 14, 1997. From the individual Defendants Plaintiff sought damages under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), for violations of her consti-

---

[1] Plaintiff voluntarily dismissed Senior Inspector Flynn following his direct trial testimony. Tr. Flynn, April 19 at 188.

tutional rights arising out of the same facts. The FTCA action was tried to the bench while simultaneously the Bivens action was tried to a jury.

The Court, having heard four days of trial testimony, having reviewed the applicable pleadings, received evidence, and reviewed the applicable law found against Plaintiff and in favor of the United States in the Federal Tort Claims Act action.

Subsequently, the individual Defendants argued that because this Court had entered judgment on Plaintiff's FTCA action, Plaintiff's Bivens action was precluded by 28 U.S.C. § 2676. This Court agreed and dismissed the Bivens action. Alternatively, this Court found that if the § 2676 judgment bar does not apply, the individual Defendants were nevertheless entitled to qualified immunity. The Court enters the following Order to that effect.[2]

FACTUAL BACKGROUND

Plaintiff Janneral Denson is an American citizen residing in Boyton Beach, Florida. Tr. Denson, April 21 at 129. On February 14, 1997, Plaintiff Janneral Denson, who was approximately six months pregnant, arrived at the Fort Lauderdale International Airport following a brief trip to Jamaica. Tr. Friedland, April 18 at 59; Pl. Trial Ex. 1; Tr. Denson, April 21 at 146-148; Tr. Denson, April 21 at 165. Plaintiff traveled from Miami to Jamaica on the evening of Wednesday, February 12, 1997

---

[2] In light of the Court's August 22, 2005 ruling on the applicability of the § 2676 judgment bar, this ruling sets forth the alternative underlying legal rationale for dismissal of the *Bivens* action and the individual Defendants' entitlement to qualified immunity.

and returned on an unscheduled Air Jamaica flight to the Fort Lauderdale airport on the afternoon of Friday, February 14, 1997. Tr. Friedland, April 18 at 59-61; Pl. Trial Ex. 1; Tr. Denson, April 21 at 146-148. The total length of Plaintiff's trip was approximately one full day. Tr. Friedland, April 19 at 96; Pl. Trial Ex. 1. Jamaica is known to Customs inspectors as a source country for smuggling narcotics into the United States. Tr. Friedland, April 18 at 62; Tr. Smith, April 20 at 102, 129; Tr. Fortin, April 21 at 16; Tr. Cappuccio, April 21 at 32-33. South Florida is considered an entry point into the United States for narcotics from source countries. Tr. Fortin, April 21, at 16. When there is a flight arriving from a source country, United States Customs inspectors are on high alert. Tr. Flynn, April 19 at 145; Tr. Fortin, April 21 at 14-20; Tr. Friedland, April 19 at 88, 96, 106; Tr. Cappuccio, April 21 at 32. Plaintiff entered the United States with no luggage and carried only a purse and a small to medium sized bag. Tr. Denson, April 21 at 141, 142, 148. Plaintiff passed through the primary customs inspection without incident. Tr. Denson, April 21 at 148-149. Subsequently, Senior Inspector Friedland ("SI Friedland"), who was posted at a secondary Customs station, observed Plaintiff exiting the Customs area and avoiding eye contact. Tr. Friedland, April 18 at 71; Tr. Friedland, April 19 at 88-89. SI Friedland further noted that Plaintiff was pregnant and was traveling with no luggage. *Id.* United States Customs inspectors were aware of a smuggling trend in which pregnant women were recruited as drug couriers because they were less likely to be detected by United States Customs as drug couriers. Tr. Friedland, April 19 at 106-107; Tr. Lavenka, April 20 at 71; Tr. Cappuccio, April 21 at 37; Tr. Smith, April 20 at 132-133; Tr. Fortin,

April 21 at 19-20. Furthermore, Customs is unable to x-ray a pregnant women to determine if they are internal narcotics couriers. *Id.*

SI Friedland called out to Plaintiff. Tr. Friedland, April 18 at 71; Tr. Friedland, April 19 at 90. SI Friedland quickly moved toward Plaintiff. Tr. Friedland, April 19 at 90. When SI Friedland caught up with Plaintiff, she escorted Plaintiff to the secondary belt for questioning. Tr. Friedland, April 19 at 60, 91.[3] SI Friedland began asking Plaintiff routine Customs questions. Tr. Friedland, April 18 at 71. When asked about the purpose of her trip, Plaintiff stated that she went to see her husband, Richard Scott, in Jamaica. Tr. Friedland, April 19 at 94; Tr. Denson, April 21 at 152. At trial Plaintiff further explained that she went to see her husband because they had an appointment with Jamaican immigration officials to obtain a visa for him to come to the United States. Tr. Denson, April 21 at 152. SI Friedland testified that she could not recall if Plaintiff had told her that she was having a meeting with Jamaican authorities to obtain a visa for Richard Scott. Tr. Friedland, April 19 at 39. Plaintiff initially could not tell SI Friedland where Plaintiff's husband lived. Tr. Friedland, April 18 at 77; Tr. Friedland, April 19 at 94. Plaintiff later stated that her husband lived in a parish in Jamaica. Tr. Friedland, April 19 at 95.

SI Friedland asked Plaintiff how she contacted her husband. Tr. Friedland, April 18 at 77; Tr. Friedland, April 19 at 95. Plaintiff replied that she contacted her husband by telephone, but she could not give SI Fried-

---

[3] At some point during this phase of the investigation, Plaintiff was escorted into the search room. It is unclear to this Court exactly when that change in location occurred.

land her husband's telephone number. *Id.* Plaintiff had in her possession a "marriage register" of the marriage between Plaintiff and Richard Scott. Tr. Friedland, April 19 at 52. SI Friedland asked Plaintiff how she got her airplane ticket to Jamaica and who paid for her ticket. Tr. Friedland, April 19 at 95; Tr. Denson, April 21 at 152. After some hesitation, Plaintiff told SI Friedland that a man named Osmond purchased the airplane ticket to Jamaica. Tr. Friedland, April 19 at 95. However, Plaintiff did not know "Osmond's" last name. *Id.* Plaintiff further stated that she reimbursed Osmond for the ticket with money from her income tax refund and showed SI Friedland an H&R Block check stub. Tr. Denson, April 21 at 153. SI Friedland noted that Plaintiff's ticket was purchased only four (4) days prior to her trip. Tr. Friedland, April 19 at 95.

When SI Friedland questioned Plaintiff about her employment, Plaintiff stated that she worked for Office Depot. Tr. Friedland, April 19 at 98; Tr. Denson, April 21 at 153. SI Friedland requested the telephone number of Plaintiff's employer. Tr. Friedland, April 18 at 78; Tr. Friedland, April 19 at 98. When SI Friedland attempted to confirm Plaintiff's employment by calling the number provided by Plaintiff, SI Friedland found that the number had been disconnected. Tr. Friedland, April 18 at 78; Tr. Friedland, April 19 at 98. SI Friedland asked Plaintiff how much money she was carrying. Tr. Friedland, April 19 at 98. Plaintiff had in her possession two $100 dollar bills and various other bills. Tr. Friedland, April 19 at 98. Plaintiff traveled with an affidavit of citizenship, rather than a passport or other form of travel identification. Pl. Trial. Ex. 42MM; Tr. Denson, April 21 at 145-146. Plaintiff was carrying a tablet of

paper that contained the following handwritten information about her husband:

> RICHARD SCOTT—POULTRY FARMER SINCE 1994
>
> LIVES @ Belfast NEAR MORANT BAY IN THE PARISH OF SAINT THOMAS.
>
> HIS BIRTHDAY IS: FEB. 17TH (BORN 1972)
>
> How you met.
>
> DEC. 1995 A FRIEND INVITED YOU TO JAMAICA WHILE THERE WENT TO THE BEACH DUNNS RIVER MET HIM THERE.
>
> DEC. 1996 HE VISITED YOU AT YOUR FRIENDS SAINT ANN HOME YOU INVITED HIM AT HIS SAINT THOMAS HOME *YOU HAD NO PRIOR KNOWLEDGE OF HIM YOU RETURNED HOME TO FLORIDA—TELEPHONE EXCHANGE
>
> * ALWAYS USED CALLING CARDS—PRICE REASONS
>
> MARCH 1996 YOU WENT DOWN TO VISIT HIM IN JAMAICA.
>
> OCT. 1996 YOU WENT BACK TO MARRY HIM
>
> * HIS PHONE WRITTEN DOWN at HOME 809 Something
>
> You are not good with remembering Numbers.
>
> *NOT HIS PHONE ANYWAY Neighbors' Phone.

> ANY OTHER Questions Just answer something in that case try to remember what you were asked and what you answered.
>
> * DOES HE HAVE RELATIVE OR FRIENDS IN U.S. THAT YOU KNOW OR KNOW OF— NO—

Pl. Trial Ex. 423B.

Initially Plaintiff told SI Friedland that she did not know who wrote the document. Tr. Friedland, April 19 at 37. Plaintiff later told SI Friedland that she wrote the information on the tablet but that she had seven different handwritings. Tr. Friedland, April 18 at 97; Tr. Friedland, April 19 at 36-37. As part of the inspection process, SI Friedland queried the Treasury Enforcement Communication System ("TECS II") computer data base for any information concerning Plaintiff.[4] Tr. Friedland, April 19 at 101-102.

The TECS lookout stated:

> REFER TO CUSTOMS FOR ENFORCEMENT EXAM. ACQUIRED TRAVEL DOCUMENTS SHORTLY BEFORE DEPARTURE. MATCHES HI RISK NARCO-TARGETING INDICATORS. (IF ARRIVING FROM SOURCE COUNTRY).

Pl. Trial Ex. 42-CC.

---

[4] TECS is a computerized system that reveals persons who are entering the country who are on terrorist alert, outstanding warrants, probation violators, persons suspected of narcotics trafficking, money laundering and violations of other laws. Tr. Friedland, April 19 at 102; Tr. Flynn, April 19 at 148.

After further questioning by SI Friedland, Plaintiff stated that she was with a friend in Jamaica, but Plaintiff could not provide SI Friedland with this friend's last name. Tr. Friedland, April 19 at 106. In addition, Plaintiff stated that she traveled to Jamaica with her friend Shelita Jacobs (phonetic). SI Friedland believed that Plaintiff represented to her that Ms. Jacobs was traveling with Plaintiff on this trip. Tr. Friedland, April 18 at 79, 118. When SI Friedland was unable confirm that in fact Ms. Jacobs had been traveling with Plaintiff, SI Friedland believed that Plaintiff had made a false statement. Tr. Friedland, April 19 at 106. During the period of questioning at the secondary belt, Plaintiff exhibited signs of nervousness. Plaintiff held tightly to the examination belt to avoid shaking, avoided eye contact, and was breathing heavily. Tr. Friedland, April 18 at 75; Tr. Friedland, April 19 at 93, 97, 141-142.

Approximately fifteen (15) minutes after SI Friedland completed her questioning of Plaintiff, Plaintiff indicated that she needed to use the restroom. Tr. Friedland, April 19 at 110; Tr. Denson, April 21 at 156. SI Friedland conducted a pat down of Plaintiff prior to her using the restroom. Tr. Denson, April 21 at 157.[5] SI Friedland testified that she formed the pat down "within the standard operating procedure that [she had] been trained and consistent with the way you are supposed to do it." Tr. Friedland, April 19 at 110. This fact was not controverted at trial. This court thus assumes that this was a routine Terry-like pat down. The door was left open as Plaintiff used the restroom. Tr. Denson, April

---

[5] At some point SI Friedland requested and received permission from Supervisor Flynn to perform the pat down of Plaintiff. Tr. Friedland, April 18 at 57.

21 at 157. After Plaintiff used the restroom, consistent with Customs procedures, SI Friedland inspected the toilet paper, the contents of the toilet, and Plaintiff's undergarments. Tr. Friedland, April 18 at 57-58; Tr. Friedland, April 19 at 110-111; Tr. Banks, April 21 at 88, 96; Tr. Denson, April 21 at 157-159.

Upon returning from the restroom Plaintiff was placed in handcuffs and her property was inventoried. Tr. Denson, April 21 at 160. SI Friedland then read Plaintiff her rights and asked Plaintiff to sign a waiver which Plaintiff refused to do. Tr. Friedland, April 18 at 80; Tr. Denson, April 21 at 161-162; Pl. Trial Ex. 42AA.

SI Friedland next sought and received supervisory approval from Acting Port Director Levanka to transport Plaintiff to Jackson Memorial Hospital ("JMH") as a suspected internal narcotics courier. Tr. Friedland, April 19 at 36, 58-60.[6] Approval for examination at Jackson Memorial Hospital was based on the totality of the facts and circumstances gathered by SI Friedland. Tr. Lavenka, April 19 at 192, 204, 206-8; Tr. Levanka, April 20 at 50. Plaintiff was then transported to Jackson Memorial Hospital for examination and treatment.[7] Tr. Friedland, April 19 at 112; Tr. Fortin, April 21 at 12, 14.

Upon arriving at Jackson Memorial Hospital Plaintiff was photographed and told to go into a room and change from her clothes into hospital clothes. Tr. Denson, April

---

[6] Lee Lavenka was appointed by the Port Director to be the Acting Port Director from February 14 through February 16. Tr. Lavenka, April 19 at 190. He had been a supervisory customs inspector since 1991. Tr. Lavenka, April 20 at 76.

[7] Customs and Jackson Memorial Hospital have an arrangement whereby the Hospital provides medical services to patients suspected of smuggling contraband inside the body. Tr. Friedland, April 19 at 28.

21 at 163-164. Plaintiff was then taken to the Labor and Delivery section of the Hospital. Tr. Denson, April 21 at 165-166. Upon arriving at Labor and Delivery, Plaintiff was asked her name and date of birth by a Jackson Memorial Hospital employee and was asked to sign an unidentified form. *Id.* Plaintiff refused to sign this form, stating that she was not going to be responsible to pay any bill resulting from her stay. *Id.* Plaintiff was next taken into a small waiting room and asked to give a urine sample to verify her pregnancy. Tr. Denson, April 21 at 165-166. Plaintiff was then placed in a bed which was separated by curtains from other beds. Tr. Denson, April 21 at 166-167. Plaintiff's left hand was handcuffed to the bed. *Id.* In the presence of SI Friedland, Plaintiff was examined by a physician specializing in obstetrics. Tr. Friedland, April 19 at 31; Tr. Denson, April 21 at 170. The physician performed a pelvic examination and an obstetrical ultrasound examination. Tr. Denson, April 21 at 167-168. The pelvic examination was negative for drugs. Tr. Denson, April 21 at 170-171; Tr. Friedland, April 19 at 32. The obstetrical physical examination and ultrasound, however, did not rule out the possibility that Plaintiff was smuggling drugs in her digestive system. Tr. Levanka, April 19 at 234.

Because an x-ray exam during pregnancy is not permitted, Plaintiff was held for a monitored bowel movement. Tr. Friedland, April 19 at 63, 64, 118; Tr. Lavenka, April 20 at 74, 196. This process requires three separate drug-free stool samples in accordance with the standard established by the Jackson Memorial Hospital doctors and United States Customs. Tr. Friedland, April 19 at 27; Tr. Lavenka, April 19 at 196; Tr. Levanka, April 20 at 59. Plaintiff was taken back to Ward D for the monitored bowel movement. Tr. Denson, April

21 at 171. In Ward D Plaintiff was placed in a bed and one hand was handcuffed to the bed rail. Tr. Denson, April 21 at 171. Plaintiff was prescribed and provided the laxative Go-Lytely by the hospital staff. Tr. Friedland, April 19 at 26, 29-30, 120. Plaintiff testified that SI Friedland told her that she had to drink the Go-Lytely and pass three clear stools or she was not going to be able to leave. Tr. Denson, April 21 at 175. Plaintiff drank the Go-Lytely and had three bowel movements containing no packets of drugs. Pl. Trial Ex. 42 HH. The last drug free stool was passed on February 16, 1997 at 9:45 a.m. Pl. Trial Ex. 42 HH. Following the negative bowel movements, Plaintiff was informed that she was to be released, her handcuffs were removed and she was allowed to dress. Tr. Denson, April 21, at 181. Plaintiff was discharged on February 16, 1997 after no drugs were found in her digestive system. Tr. Lavenka, April 19 at 202; Tr. Friedland, April 19 at 27. Plaintiff was driven back to the Ft. Lauderdale airport, where Customs retrieved her property that had been held in a safe, and Plaintiff was allowed to continue on her travel. Tr. Friedland, April 19 at 117, 122; Tr. Denson, April 21 at 182-184.

DISCUSSION

I. Motion Pursuant to Rule 50(a)

At the close of Plaintiff's case in chief, the individual Defendants moved for judgment as a matter of law, pursuant to Rule 50(a)(1)(2) of the Federal Rules of Civil Procedure based on the defense of qualified immunity. Qualified immunity is a question of law for the Court to determine. *Ansley v. Heinrich*, 925 F.2d 1339, 1341

(11th Cir. 1991). This legal determination may be made by the court either before trial, during trial, or after trial." *Stone v. Peacock*, 968 F.2d 1163, 1165 (11th Cir. 1992).

Under Rule 50, the Court considers all evidence and inferences in the light most favorable to the non-moving party to determine whether the evidence presented is so one-sided that reasonable people could not arrive at a contrary verdict. *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001). "If there is substantial evidence opposed to the motion, such that reasonable people, in the exercise of impartial judgment, might reach differing conclusions," then the case is properly submitted to the jury. *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1230 (11th Cir. 2001).

Plaintiff contends that the denial of the individual Defendants' summary judgment motion on qualified immunity precludes a finding of qualified immunity in the individual Defendants' favor following trial. Plaintiff is mistaken. *See, e.g., Oladeinde v. City of Birmingham*, 230 F3d 1275, 1289 (11th Cir. 2000) (denial of qualified immunity affirmed by appellate court does not prevent finding qualified immunity following trial); *Shelkofsky v. Brouhgton*, 388 F.2d 977 (5th Cir. 1968) (reversal of summary judgment for a trial by jury would not preclude the district court from later entering summary judgment or judgment as a matter of law if the evidence offered at trial was insufficient to warrant submission to the jury); *see also Jackson v. Alabama State Tenure Commission*, 405 F.3d 1276, 1283 (11th Cir. 2005) (noting that "[w]hen the record changes, which is to say when the evidence and the inferences that may be drawn from it changes, the issues presented change as well.").

In *Johnson v. Breeden*, 280 F.3d 1308 (11th Cir. 2002), the Court, addressing this specific issue, noted that Defendants who are not successful with their qualified immunity defense before trial can re-assert it at the end of the plaintiff's case in a Rule 50(a) motion. *Id.* at 1317 (citing Fed. R. Civ. P. 50(a); *Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996)). The court noted that this type of motion will sometimes be denied because the same evidence that led to the denial of the summary judgment motion usually will be included in the evidence presented during the plaintiff's case, although sometimes evidence that is considered at the summary judgment stage may turn out not to be admissible at trial. *Id.* at 1317-1318 (citing *Wright v. Southland Corp.*, 187 F.3d 1287, 1304 n.21 (11th Cir. 1999); *McMillian v. Johnson*, 88 F.3d 1573, 1584-85 (11th Cir. 1996)). Where there is no change in the evidence, the same evidentiary dispute that got the plaintiff past a summary judgment motion asserting the qualified immunity defense will usually get that plaintiff past a Rule 50(a) motion asserting the defense, *although the district court is free to change its mind. Id.* at 1318 (emphasis added) (citing *Abel v. Dubberly*, 210 F.3d 1334 (11th Cir. 2000) (holding that "binding precedent in this Circuit expressly permits consideration of a Rule 50 motion after the denial of summary judgment") (citing in turn *Gross v. Southern Ry. Co.*, 446 F.2d 1057, 1060 (5th Cir. 1971) ("It is settled in this Circuit, therefore, that prior denial of summary judgment does not rule out the possibility of a subsequent directed verdict."); *Gleason v. Title Guarantee Co.*, 317 F.2d 56, 58 (5th Cir. 1963) ("Sound practical reasons . . . may justify a trial judge's denying summary judgment even on the identical evidence supporting his granting a directed verdict."); *Stanley v. Guy*

Scroggins Constr. Co., 297 F.2d 374, 378 (5th Cir. 1961) ("This holding [reversing a grant of summary judgment] does not rule out the possibility of a directed verdict. It may be, when the evidence is in, that the district judge will find that the case should be disposed of by a directed verdict. He is free to do so."); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1241-42, 1253 (11th Cir. 1999) (affirming the district court's granting of a Rule 50 motion following denial of a Rule 56 motion); *Walker v. NationsBank N.A.*, 53 F.3d 1548, 1552-53, 1558 (11th Cir. 1995) (affirming a grant of a Rule 50 motion after denial of a Rule 56 motion)).

Summary judgment is determined based on the facts available to the court at that stage in the proceeding. In sharp contrast, particularly in a qualified immunity case, at the close of all trial testimony, the court is presented with many more facts than were available to it at the summary judgment stage. It is thus incumbent upon this Court, that if it indeed believes that the individual Defendants are entitled to qualified immunity at this stage, that this Court grant it.

II. Qualified Immunity

Determination of qualified immunity is a legal question, the answer dependent on the particular facts of the case. *Sheth v. Webster*, 145 F.3d 1231, 1236 (11th Cir. 1998). The United States Supreme Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *McElligott v. Foley*, 182

F.3d 1248, 1254 (11th Cir. 1999) ("[W]e must 'first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'").

For a right to be "clearly established" for qualified immunity purposes, previous case law must have developed it in a concrete factual context so as to make it obvious to a reasonable government actor that his actions violate federal law. *Sanders v. Howze*, 177 F.3d 1245 (11th Cir. 1999). Whether applicable law was clearly established at the time of the challenged action is determined by reference to decisions of the United States Supreme Court and the Court of Appeals for the Eleventh Circuit. *D'Aguanno v. Gallagher*, 50 F.3d 877, 881 n.6 (11th Cir. 1995).[8]

In applying the test for qualified immunity, we must take "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989). The reasonableness inquiry is an objective one: "the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

The question presented is whether, on an objective basis, the Customs inspectors had, at the very least, arguable reasonable suspicion that Plaintiff was an alimentary canal smuggler at each of the three graduated steps

---

[8] On this record, it is undisputed that the individual Defendants were acting within the scope of their discretionary authority. *See Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir. 1997).

of her detention: (1) the initial detention; (2) the restroom search; and (3) the transport to and examination at the Jackson Memorial Hospital.

A. Initial Stop and Pat Down

In the context of border searches, the law that is binding upon this Court is very well settled. Customs and Immigration checkpoints in our Nation's airports are the functional equivalent of national borders, and as such, United States Customs officials can conduct routine searches upon all individuals as a matter of constitutional right. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973); *United States v. Hewitt*, 724 F.2d 117 (11th Cir. 1984). Routine border searches, which include searches of luggage and Terry-style pat down searches, are presumed to be reasonable. *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984) (holding that "[n]o articulable suspicion is required for routine border searches which only intrude slightly on a person's privacy. Both a luggage search and a pat-down or frisk fall within this category and these searches can legitimately be carried out on no more than a generalized "mere suspicion" or "subjective response" of the customs inspector") (internal citations omitted); *Brent v. Ashley*, 257 F.3d 1294 (11th Cir. 2001) (holding that no level of suspicion is necessary for the stop of an entrant, for questioning of the individual, for examination of the entrant's possessions, or for a pat-down of the outer garments).

An initial stop, search of luggage and pat down search, are presumed to be reasonable at the border. *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *Uni-*

ted States v. Vega-Barvo, 729 F.2d 1341, 1344-5 (11th Cir. 1984). Here, the record reveals that Plaintiff was subjected to a pat down behind closed doors. The uncontroverted evidence demonstrates that during this pat down, the Customs official manually inspected Plaintiff's entire body above her clothing. This portion of Plaintiff's experience did not exceed the threshold of routine Customs procedure and as such, was well within the bounds of the law. Because the initial stop did not constitute more than a routine border search, Plaintiff has failed to demonstrate that the initial stop violated her constitutional rights.

B. The Restroom Search

The Supreme Court in *United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985) noted that internal smuggling of drugs gives an inspector no external clues that this is the method of concealment. The Court held that "the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal." *Montoya*, 473 U.S. at 541.

The reasonable suspicion standard requires a showing of articulable facts which are particularized as to the person and as to the place that is to be searched. *Vega-Barvo*, 729 F.2d 1341 (11th Cir. 1984). Furthermore, the level of reasonable suspicion required to justify a search will increase according to the level of the search's intrusiveness. *United States v. Vega-Barvo*, 729 F.2d 1341,

1346 (11th Cir. 1984), *United States v. Ping*, 729 F.2d 1357, 1359 (11th Cir. 1984).

At this point during the enforcement exam, the officers were presented with the following circumstances. Plaintiff was a pregnant female who arrived in Ft. Lauderdale from Jamaica, a source country, after an extremely brief stay. Customs inspectors are aware that short trips are common by smugglers, because the cost of the trip is minimized and the payoff increased. Tr. Friedland, April 18 at 61; Tr. Friedland, April 19 at 96-97. Plaintiff was traveling with no luggage and carried only a purse and handbag. Inspectors were aware that lack of luggage is common for internal narcotics carriers because it minimizes the amount of time that they must remain in the Customs area. Tr. Friedland, April 18 at 70; Tr. Levanka, April 19 at 229. Plaintiff could not provide any specifics about the person who, only four days prior to travel, had purchased Plaintiff's airplane ticket. Inspectors testified that a "third-party booking" of a ticket is significant in the context of internal narcotics couriers, particularly when the passenger does not know the name of the purchaser. Third-party booking is a method that smugglers use to avoid revealing the identity of one or more of the smugglers. Tr. Friedland, April 18 at 69; Tr. Friedland, April 19 at 96; Tr. Smith, April 20 at 143; Tr. Fortin, April 21 at 19.

Plaintiff had taken multiple short trips to Jamaica in 1996. Tr. Denson, April 21 at 189. Plaintiff stated that she went to Jamaica to visit her husband but she was unable to provide an address or telephone number for her husband. Plaintiff could not present verifiable employment information. Lack of verifiable employment is a factor that inspectors consider in assessing the possi-

bility of narcotics smuggling. Tr. Friedland, April 18 at 78, April 19 at 98. Furthermore, the phone number for her employer that Plaintiff provided to SI Friedland was out of service. *Supra.*

To further heighten the Customs officers' suspicion, Plaintiff was flagged as a potential drug courier in the TECS II computer system. Tr. Friedland, April 18 at 125-6, April 19 at 45, 101-102. A TECS II entry is significant to inspectors in assessing whether the person entering the United States is importing illegal drugs. Tr. Smith, April 20 at 131.

In addition to all of these suspicious circumstances, there was the extraordinarily peculiar script that Plaintiff was carrying. The script appeared to be a cover story written for Plaintiff by a third party. Tr. Friedland, April 19 at 36. Each of the Customs inspectors who testified at trial agreed that the script was a "red flag," "highly suspicious," and indicative of someone entering the United States with illegal drugs. Tr. Lavenka, April 20, at 67-68; Tr. Smith, April 20 at 130-131, 137; Tr. Cappuccio, April 21 at 36; Tr. Fortin, April 21 at 17-18, 22-24. Many answers to SI Friedland's questions were provided on the script. Tr. Friedland, April 19 at 39, 101.

At trial Plaintiff testified that at the time of her detention she was carrying immigration documents for Richard Scott's immigration to the United States. Plaintiff testified that the script was tailored to the interview that she and her husband, Richard Scott, were going to have with Jamaican immigration officials. Tr. Denson, April 21 at 144. SI Friedland testified, however, that Plaintiff did not show her these immigration documents. Tr. Friedland, April 18 at 74; Tr. Friedland, April 19 at

40. Plaintiff also testified that she was carrying photographs from her wedding to Richard Scott for their interview with Jamaican immigration officials. Tr. Denson, April 21 at 152, 154; Pl. Trial Ex. 59-B-G. For purposes of this Order this Court assumes, as it must, that Plaintiff was carrying such documents and showed them, as well as the photographs, to SI Friedland.

Furthermore, Plaintiff was traveling with an Affidavit of Citizenship in lieu of a passport. This affidavit of citizenship is a travel document that experienced inspectors had not previously seen and did not know that one could travel with to Jamaica. Tr. Friedland, April 18 at 123; Tr. Friedland, April 19 at 47; Tr. Flynn, April 19 at 149-150; Tr. Lavenka, April 19 at 214, Tr. Smith, April 20 at 139-140. Additionally, Plaintiff exhibited many indications of nervousness that inspectors are trained to look for, including heavy breathing and avoiding eye contact. Tr. Smith, April 20 at 133; Tr. Cappuccio, April 21 at 34.

Moreover, Plaintiff, in the midst of an enforcement exam, requested to use the restroom. SI Friedland, accompanied by Inspector Banks, escorted Plaintiff to the restroom. The door was left open as Plaintiff used the restroom. Tr. Denson, April 21 at 157. SI Friedland testified that she went into the bathroom with Plaintiff because it was Customs policy that two female officers must accompany a female who requests to use the bathroom during an enforcement exam. Tr. Friedland, April 18 at 57. Further, she testified that, as was required by Customs, she watched Plaintiff urinate, looked at her undergarments, panty liner, toilet bowl and used tissue. *Id.* at 57-58; Tr. Friedland, April 19 at 110-111, Tr. Banks, April 21 at 88, 96; Tr. Denson, April 21 at 157-

159. SI Friedland testified that it was not her intent to take Plaintiff to the ladies room or to search Plaintiff absent Plaintiff's request to use the restroom. Tr. Friedland, April 19 at 110. Customs officers were aware that internal narcotics couriers frequently try to dispose of narcotics in the restroom. Tr. Friedland, April 19 at 111.

Significantly, the Customs officers did not search Plaintiff's body in a manner consistent with a typical strip search. Rather the Customs officers' restroom examination of Plaintiff was limited to inspecting the above mentioned items. Second, this Court notes that the intrusiveness of this non-routine border search was minimal. The intrusiveness of a search is measured by the indignity suffered by the person searched. *Vega-Barvo*, 729 F.2d at 1345. In *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984) the court held that as the intrusiveness of the search increases, the amount of suspicion necessary to justify the search correspondingly increases. *Id.* Thus, the personal indignity suffered by the individual searched controls the level of suspicion required to make the search reasonable. *Id.* at 1346. The Court in *Vega-Barvo* isolated three factors that contribute to the indignity of the person searched: (1) personal contact between the searcher and the person searched; (2) exposure of intimate body parts; and (3) use of force. *Id.* at 1346.

There was no testimony at trial of any physical contact between Plaintiff and SI Friedland during the restroom search. Moreover, any exposure of intimate body parts was minimal. Furthermore, evidence in the record does not support a finding of any threat of force or use of force. As such, viewing the evidence in the light most

favorable to Plaintiff and applying the *Vega-Barvo* factors to assess the indignity suffered by Plaintiff during the restroom encounter, the Court determines that the intrusiveness of this search and the indignity suffered by Plaintiff was minimal.[9]

This Court finds, that even viewing the evidence in the light most favorable to Plaintiff, the Customs officers had overwhelming reasonable suspicion to suspect that Plaintiff was indeed an internal narcotics courier and credible fear that she was requesting to use the restroom to dispose of narcotics. At a minimum, this Court finds that Plaintiff has not shown that a reasonable Customs officer presented with these same facts, would have known that this conduct violated Plaintiff's clearly established constitutional rights.[10] *See Jackson*

---

[9] The officers did not visually inspect Plaintiff's orifices nor did they engage in any analysis to determine if her urine contained traces of narcotics.

[10] This Court is mindful of the many cases in which the Eleventh Circuit Court of Appeals has assessed a variety of reasonable suspicion determinations in criminal cases in which defendants have sought to suppress evidence of their internal smuggling. The facts of those cases are no more extensive in finding reasonable suspicion than the facts in this case. In *United States v. Saldarriaga-Marin*, 734 F.2d 1425 (11th Cir. 1984), Marin was wearing a party dress which inspectors thought unusual for travel attire, the ticket had similarities to another traveler in custody, she was nervous, and the passenger stated that she was going to visit a relative, but could not give the address or telephone number for the relative. The court held that those factors constituted reasonable suspicion to conduct an x-ray exam. The x-ray of passenger Marin was inconclusive. A laxative was given to the traveler to induce a bowel movement, which the court upheld. In *United States v. Mosquera-Ramirez*, 729 F.2d 1352 (11th Cir. 1984), the court held that a person who refuses an x-ray search may be detained until a bowel movement occurs through natural body functions. In that case, the court upheld holding the traveler for a monitored bowel movement based on in-

v. Sauls, 206 F.3d 1156 1165 (11th Cir. 2000) ("The burden of showing that an officer violated clearly established law falls on the plaintiff.").

C. Transport to Jackson Memorial Hospital

Upon reasonable suspicion, persons suspected of being "internal drug couriers," "swallowers" or "mules" may be detained and taken to a hospital for either an x-ray or confined for excretion of the stomach contents. *United States v. De Montoya*, 729 F.2d 1369, 1371 (11th

---

consistent answers which led to a more thorough search, where the defendant became more nervous and evasive. In *United States v. Pino*, 729 F.2d 1357, 1359 (11th Cir. 1984), the court upheld a rectal exam of the traveler, finding it justified by travel from a source county, inconsistent clothing for the travel purpose, cash ticket purchased by another, and evasive answers provided in a nervous manner. In *United States v. Vega-Barvo*, 729 F.2d 1341, 1344 (11th Cir. 1984), the court held that reasonable suspicion exists for a search, even where it is based substantially on the inability to give a credible explanation for a trip to the United States, traveling alone, nervous, with only one piece of luggage, and a ticket purchased by another. "Since swallowers follow a different mode of operation, customs agents' suspicions will be aroused by different factors. For example . . . the traveler's inability to explain his or her trip. . . . " *Vega-Bravo*, 729 F.2d at 1350. Moreover the facts assessed by the Supreme Court in *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985), were far less suspicious than those presented to the Customs officials in this case. In *Montoya*, suspicions were aroused by the number of trips the traveler had taken, her arrival from a source city, suspicious answers given to questions, and inconsistent possessions for the purpose of the trip. Plaintiff was wearing two pairs of elastic underpants with a paper towel lining, had not taken food or drink, resisted the calls of nature, and had a rigid and firm stomach.

Most significantly, *Brent v. United States*, 66 F. Supp. 2d 1287 (S.D. Fla. 1999) *aff'd sub nom Brent v. Ashley*, 247 F.3d 1294 (11th Cir. 2001), to which this case has often been compared, was decided after the events of this case occurred.

Cir. 1984); *United States v. Padilla*, 729 F.2d 1367 (11th Cir. 1984); *see also United States v. Montoya De Hernandez*, 473 U.S. 531, 544 (1985) ("Once reasonable suspicion exists to detain a traveler, the detention can continue "for the period of time necessary to either verify or dispel the suspicion").

"Once a particularized suspicion arises that you are an internal carrier, the agents can conduct a search sufficient to determine the accuracy of that suspicion, the type of search depending in part on what you consent to. In the absence of consent, the agents can detain you until nature reveals the truth or falsity of their suspicions." *United States v. Pino*, 729 F.2d at 1360. "Once the Customs officers developed reasonable suspicion that [Plaintiff] was an internal carrier, they could permit nature to run its course or ask [Plaintiff] to speed up the process by taking the laxative." *United States v. Saldarriaga-Marin*, 734 F.2d 1425 (11th Cir. 1984).[11] In *Vega-Barvo* the court adopted a "flexible test which adjusts the strength of suspicion required for a particular search to the intrusiveness of that search." 729 F.2d at 1344.

As detailed above, SI Friedland was presented with a plethora of extremely unusual and troubling facts that combined to form her reasonable suspicion that Plaintiff

---

[11] This Court notes that handcuffing someone who is a suspected internal narcotics carrier is reasonable. *United States v. Henao-Castano*, 729 F.2d 1364, 1366 (11th Cir. 1984) (finding that "[s]hackling [Plaintiff] to a wheelchair was a reasonable method of preventing him from attempting to dispose of the contents of his stomach before they could be searched").

was an internal narcotics courier.[12] *See, e.g., United States v. Arvizu*, 534 U.S. 266, 275 (2002) (noting that "totality of circumstances" is the principle which "governs the existence *vel non* of reasonable suspicion"); *Vega-Barvo*, 729 F.2d at 1350 ("Many of the factors supporting reasonable suspicion will seem innocent enough if evaluated independently and without the expertise of an experienced customs inspector").

The Customs officers' actions, from their transport of Plaintiff to Jackson Memorial Hospital and the subsequent examinations of Plaintiff, were reasonable in light of the overwhelming evidence that provided the officers with reasonable suspicion that Plaintiff was an internal narcotics carrier. At a minimum, this Court finds that Plaintiff has not shown that a reasonable Customs officer presented with these same facts, would have known that this conduct violated Plaintiff's clearly established constitutional rights. *Jackson v. Sauls*, 206 F.3d 1156 1165-66 (11th Cir. 2000) ("when an officer asserts qualified immunity, the issue is not whether reasonable suspicion existed in fact, but whether the officer has 'arguable' reasonable suspicion," that is, whether a reasonable officer could have believed that the searches comported with the plaintiff's constitutional rights). The testimony of each of the Customs officials at trial sup-

---

[12] The evidence presented at trial reveals that the SI Friedland did not seek permission to transport Plaintiff to JMH until after the restroom search. At that time, the facts that were presented to SI Friedland before the restroom search and the accompanying reasonable suspicion had not dissipated. Moreover, the bathroom search, as minimally intrusive at it was, did not provide the individual Defendants with evidence as to whether Plaintiff was an internal carrier or whether her urine contained traces of narcotics. The transport to JMH based on these facts was therefore reasonable.

port this Court's determination that the individual Defendants' actions were at the very least based on arguable reasonable suspicion.

CONCLUSION

Accordingly, based on the foregoing it is

ORDERED AND ADJUDGED that qualified immunity is GRANTED to the individual Defendants Cheryl Friedland and Lee Lavenka.

DONE AND ORDERED in Chambers at Miami, Florida, this 3rd day of October, 2005.

/s/ K. M. MOORE
K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

cc: All counsel of record

REPLY BRIEF

(3)

No. 09-803

Supreme Court, U.S.
FILED
MAY 17 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JANNERAL DENSON and JORDAN L. TAYLOR, a minor, through his Legal Guardian JANNERAL DENSON,

Petitioners,

v.

UNITED STATES OF AMERICA, LEE LAVENKA, and CHERYL FRIEDLAND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

BARBARA A. HEYER
HEYER & ASSOCIATES, P.A.
Attorneys for Petitioners
1311 S.E. 4th Avenue
Fort Lauderdale, FL 33316
(954) 522-4922

229049

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement of the Case	1
I. Without a jury verdict through special interrogatories, no factual determination upon which to base a qualified immunity analysis could be made by the district court or Appellate Panel 2.	3
II. The judgment in the FTCA claim did not bar Petitioner's *Bivens* claim.	6
III. The claims and injuries of a minor child are determined under state law and, are therefore, separate, not derivative of his mother's injuries and claims under the Federal Tort Claims Act.	9
IV. The Supremacy Clause does not bar state tort claims in FTCA claims.	11
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Aetna Casualty and Surety Co. v. United States,
570 F.2d 1197 (4th Cir. 1978) 8

Arevalo v. Woods,
811 F.2d 487 (9th Cir. 1987) 8

Brent v. Ashley,
247 F.3d 1294 (11th Cir. 2001) 9

Burns v. Lawther,
53 F.3d 1237 (11th Cir. 1995) 9

Carlson v. Green,
446 U.S. 14 (1980) 6, 7

Engle v. Mecke,
24 F.3d 133 (10th Cir. 1994) 8

Farmer v. Perrill,
275 F.3d 958 (10th Cir. 2001) 8

Gasho v. United States,
39 F.3d 1420 (9th Cir. 1994) 8

Harris v. United States,
422 F.3d 322 (6th Cir. 2005) 9

Hoosier Bancorp of Indiana, Inc. v. Rasmussen,
90 F.3d 180 (7th Cir. 1996) 8

Cited Authorities

	Page
Hui v. Castaneda, 08-1529 (U.S. 5-3-2010)	6
Kreines v. United States, 959 F.2d 834 (9th Cir. 1992)	9
Larusso v. Garner, 888 So.2d 712 (Fla. 4th DCA 2004), *review denied*, 910 So.2d 262 (Fla. 2005)	11
Manning v. United States, 546 F.3d 430 (7th Cir. 2008)	9
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)	3
Rodriguez v. Handy, 873 F.2d 814 (5th Cir. 1989)	8
Serra v. Pichardo, 786 F.2d 237 (6th Cir. 1986)	8
Trentadue v. United States, 397 F.3d 840 (10th Cir. 2005)	9
United States v. Smith, 499 U.S. 160 (1991)	7
Will v. Hallock, 546 U.S. 345 (2006)	6, 8

Petitioners, Janneral Denson and Jordan L. Taylor, a minor, respectfully reply to Respondents' Brief in Opposition.

STATEMENT OF THE CASE

Contrary to the Respondents' recitation of the statement of the case, the record evidence clearly reflects Petitioner's statement of the case. Respondents rely wholly upon the testimony of Respondents Cheryl Friedland and Lee Lavenka. (Respondents' Brief, p. 2-7, 10-11). Said evidence was found by Appellate Panel 1 to be severely lacking in probable cause, in that "[a] reasonable customs inspector acting in the federal defendants' stead would have known that the non-particularized, general concerns evoked by [Denson]'s appearance and actions did not create sufficient probable cause to justify the intrusive searches." *See* Appendix C, at 122a.

Respondents' reliance upon the "tablet" found in Petitioner's bag during the search at the airport is equally misplaced. (Respondents' Brief, p. 4-5). The district court, in response to Respondents' summary judgment motions, held that:

> [D]enson was carrying a sheet of paper, written in the second person singular, which Inspector Friedland claims contained answers to questions that might be posed by customs or immigration officials. These answers simply do not give rise to the type of suspicion that is necessary for a strip search. The sheet of paper, while strange, provides no basis for

> suspicion that Denson was an internal courier. *The information on the paper was clearly directed towards immigration issues, rather than to customs issues. Nothing in the paper supports the suspicion that Denson was carrying drugs, as would be necessary to support the strip search.*

(Emphasis added). *See* Order entered January 29, 2002; R217-19.

Respondents also argue that "[P]etitioner was not forced to drink the laxative" but that she "drank the [laxative] in order to put an end to her ordeal." (Respondents' Brief, n. 3, citing to Appellate Panel 2, Appendix A, at 77a, n.3). Each search of Petitioner's body was without her consent and each search was more invasive and dangerous, culminating in her being forced to take the bowel cleaner, Go-Lytely. The district court acknowledged that "she had to drink the Go-Lytely and pass three clear stools or she was not going to be able to leave." *See* Appendix B, at 93a.

The evidence presented at trial demonstrated that the Petitioner was forced to undergo ever more life threatening searches of her body based upon "non-particularized, general concerns" and a "piece of paper" directed "towards immigration issues." Based upon this evidence a jury certainly could have reasonably concluded that the ever more intrusive searches of Janneral Denson's body had violated her constitutional rights.

I. Without a jury verdict through special interrogatories, no factual determination upon which to base a qualified immunity analysis could be made by the district court or Appellate Panel 2.

Respondents state that

> . . . nothing prevented the district court from reconsidering its previous denial of qualified immunity. Nor was the court of appeals estopped from finding these items, and the totality of the surrounding circumstances, equally suspicious. . . . Were it otherwise, courts would be required to view the evidence in the light most favorable to a plaintiff at the summary-judgment stage, and then would be unable to evaluate the evidence and reach a different conclusion at the trial stage.

(Respondents' Brief, p. 20). Respondents are wrong. For a judgment as a matter of law, in the absence of a jury's finding of fact, both the lower court and the Appellate Panel, in reviewing qualified immunity, were required to view all the record evidence in the light most favorable to the Petitioner, the nonmoving party. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-1 (2000).

Having found for the Respondent on the FTCA claims, the district court dismissed the jury without allowing them to render a verdict on the *Bivens* claim against Respondents Friedland and Lavenka, as the district court had barred the *Bivens* claim. Appellate Panel 2 affirmed the district court's error in finding no violations of Petitioner's constitutional rights.

Contrary to Respondents' claim that there were facts "materially different" at trial from those at the summary judgment stage when qualified immunity was denied (Respondents' Brief, p. 20), the only difference was that the district court and Appellate Panel 2 invaded the domain of the jury, weighing evidence, making credibility determinations and choosing to ignore the evidence presented by the Petitioner. Petitioner's evidence clearly demonstrated that each more invasive search of Ms. Denson's body by the Respondents was based solely upon an outdated TECS document and a "sheet of paper" which Respondents knew about at the airport, and which the district court and Appellate Panel 1, at the summary judgment stage, clearly stated did not provide a basis for the strip and cavity searches.

The jury was not required to believe Friedland's testimony that Denson was "was attempting to quickly exit the Customs area, was traveling alone, was avoiding eye contact, . . . had significant difficulty in answering routine questions about her trip and exhibited signs of nervousness, . . . was breathing heavily, sweating profusely, and holding on to an x-ray machine to avoid shaking," (Respondents' Brief, p. 2-3) in light of the fact that said testimony had been contradicted by Petitioner's evidence.

As Respondents acknowledge, at the summary judgment stage the district court "placed no weight on two key pieces of evidence available to the Customs inspectors: the suspicious script, and the TECS alert identifying petitioner as a potential drug courier. 98-7256 Order 19-21 (S.D. Fla. Jan. 29, 2002) (docket entry 217). After discovery and trial, however, the

district court concluded that both of these factors were highly suspicious." (Respondents' Brief, p. 20). The two pieces of evidence did not change. Nothing changed as to the outdated TECS document and "*[n]othing in the paper supports the suspicion that Denson was carrying drugs, as would be necessary to support the strip search.*" (Emphasis added). *See* Order entered January 29, 2002; R217-19. Appellate Panel 2 accepted the finding of the district court. This ignored the role of the jury. As to the *Bivens* claim, it was up to the jury to determine what significance, if any, to assign to the expired TECS document and the piece of paper found in Petitioner's luggage at the airport.

Respondents argue that, in a jury trial, the courts are "not estopped" from determining the suspiciousness of the evidence, i.e. weighing the evidence, since, "[w]ere it otherwise, courts would be required to view the evidence in the light most favorable to a plaintiff at the summary-judgment stage, and then would be unable to *evaluate the evidence* and reach a different conclusion at the trial stage." (Emphasis added)(Respondents' Brief, p. 20). Without a jury's finding of fact, there was simply no factual basis for Appellate Panel 2 to determine whether arguable reasonable suspicion existed sufficient to detain Denson and conduct the ever more invasive, degrading and dangerous searches of her private body cavities.

II. The judgment in the FTCA claim did not bar Petitioner's Bivens claim.

Respondents state that

> [e]ven if there were any error on the qualified immunity determination, petitioner's *Bivens* claim would fail based on a separate ground. As the district court explained, the judgment bar in the FTCA barred petitioner's *Bivens* claim.

(Respondents' Brief, p. 20-1). According to the district court and Respondents, while a plaintiff may simultaneously bring both FTCA and *Bivens* claims, the *Bivens* claim will always be barred by any decision on the FTCA claim. This interpretation is in conflict with the Westfall Act and the rulings in *Will v. Hallock*, 546 U.S. 345 (2006) and *Carlson v. Green*, 446 U.S. 14 (1980). See also: *Hui v. Castaneda*, 08-1529 (U.S. 5-3-2010).

The 1974 and 1988 amendments to the FTCA enabled plaintiffs to bring an action against the United States for intentional torts committed by federal law enforcement officers *simultaneously* with a *Bivens* action against the individual defendants for constitutional violations. Since the FTCA was no longer the exclusive remedy in such circumstances, the judgment bar did not apply to a plaintiff's *Bivens* claims.

> FTCA was enacted long before *Bivens* was decided, but when Congress amended FTCA in 1974 to create a cause of action against the United States for intentional torts committed

> by federal law enforcement officers, 28 U.S.C. §2680(h), the congressional comments accompanying that amendment made it crystal clear that Congress views FTCA and *Bivens* as parallel, complementary causes of action . . .

Carlson, *supra* at 19-20.

> In the absence of a contrary expression from Congress, §2680(h) thus contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under FTCA against the United States *as well as* a *Bivens* action against the individual officials alleged to have infringed their constitutional rights.

(Emphasis added). *Id.* at 20.

In 1988, Congress codified the holding in *Carlson*, by passing the Westfall Act.

> Section 5 declares that the FTCA is *not* the exclusive remedy for torts committed by Government employees in the scope of their employment when an injured plaintiff brings: (1) a *Bivens* action, seeking damages for a constitutional violation by a Government employee; or (2) an action under a federal statute that authorizes recovery against a Government employee. See 2679(b)(2).

United States v. Smith, 499 U.S. 160, 166-7 (1991).

> While a qualified immunity claim is timely from the moment an official is served with a complaint, the judgment bar can be raised only after a case under the Tort Claims Act has been resolved in the Government's favor. If a *Bivens* action alone is brought, *there will be no possibility of a judgment bar, nor will there be so long as a Bivens action against officials and a Tort Claims Act against the Government are pending simultaneously.*

(Emphasis added). *Hallock*, *supra* at 354.

There is much confusion and conflict among and within the circuits on the issue of Bivens and the FTCA's judgment bar. Some courts have held that any FTCA judgment, regardless of its outcome, bars a subsequent Bivens action on the same conduct that was at issue in the prior judgment.[1] Other cases, some of which were decided before the 1988 Westfall Act, have held that an FTCA judgment against the government bars a contemporaneous Bivens claim.[2] Some courts, where concurrent FTCA and Bivens actions had been filed, have allowed the plaintiffs' Bivens actions to proceed to

---

1. *Hoosier Bancorp of Indiana, Inc. v. Rasmussen*, 90 F.3d 180 (7th Cir. 1996); *Farmer v. Perrill*, 275 F.3d 958 (10th Cir. 2001); *Gasho v. United States*, 39 F.3d 1420 (9th Cir. 1994).

2. *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986); *Arevalo v. Woods*, 811 F.2d 487 (9th Cir. 1987); *Rodriguez v. Handy*, 873 F.2d 814 (5th Cir. 1989); *Aetna Casualty and Surety Co. v. United States*, 570 F.2d 1197 (4th Cir. 1978); *Engle v. Mecke*, 24 F.3d 133 (10th Cir. 1994).

trial after an adverse judgment on the FTCA claims.[3] Other courts have held that any FTCA judgment, for or against, bars any Bivens claim on the same conduct, even nullifying a previous entered verdict on the Bivens claim.[4]

III. The claims and injuries of a minor child are determined under state law and, are therefore, separate, not derivative of his mother's injuries and claims under the Federal Tort Claims Act.

Respondents state that:

> [b]ecause petitioner Taylor and his mother were inherently inseparable for purposes of analyzing reasonable suspicion for the searches . . . the court of appeals properly rejected petitioner Taylor's tort claims as derivative of his mother's tort claims.

(Respondents' Brief, p. 22).

Under Florida law, an action is derivative when a claimant seeks damages based on injuries to another party. However, an action where a party sues in his own right for his own injuries and damages is not a derivative action. *See Stokes v. Liberty Mutual Insurance Co.*, 213

3. *Kreines v. United States*, 959 F.2d 834 (9th Cir. 1992); *Burns v. Lawther*, 53 F.3d 1237 (11th Cir.1995)(per curiam); *Brent v. Ashley*, 247 F.3d 1294 (11th Cir. 2001).

4. *Trentadue v. United States*, 397 F.3d 840 (10th Cir. 2005); *Manning v. United States*, 546 F.3d 430 (7th Cir. 2008); *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005).

So.2d 695, 698 (Fla. 1968). Petitioner Taylor's primary FTCA claims were for assault and the infliction of emotional distress flowing from the physical injuries he suffered as a result of that assault, not false arrest and imprisonment. Therefore Respondents Friedland and Lavenka's actions towards him must be analyzed separately under the appropriate legal standard, pursuant to Florida law.

Appellate Panel 2 acknowledged that Respondent Friedland knew that Denson was "obviously pregnant" and that "x-ray examinations may not be performed on a pregnant woman for fear of harming the unborn child" (Appendix A, at 5a). The district court found that "Friedland and Lavenka had required Denson to take the bowel cleanser, Go-Lytely". *See* Trial Transcript, April 22, 2005: R374-42-3. However, neither court made any factual determination as to whether the force directed toward Petitioner Taylor, subjecting him to an unnecessary risk of harm, was reasonable and justified under the circumstances. Neither court made any factual determinations as to Petitioner Taylor's FTCA claims.

Respondents' attempt to negate the Florida Born Alive Doctrine (Respondents' Brief, p. 22-3), overlooks the obvious fact that, prior to birth, all fetuses are inherently inseparable from their pregnant mothers and that the treatment of or any injury to the mother is likely to result in a separate and different injury to the unborn child. The law is well established in Florida that a child born alive is entitled to seek compensation for his injuries sustained in utero. "'[A] child born alive, having suffered prenatal injuries at any time after conception,

has a cause of action against the alleged tortfeasor.'" (Internal citation omitted). *Larusso v. Garner*, 888 So.2d 712, 719 (Fla. 4th DCA 2004), review denied, 910 So.2d 262 (Fla. 2005).

IV. The Supremacy Clause does not bar state tort claims in FTCA claims

Respondents state that:

> The court of appeals held that petitioners' FTCA claims are barred by the Supremacy Clause. We agree with the court's premise that Congress could not have intended that the United States would be held liable for the actions of its law enforcement officers that were constitutional and within the scope of their official duties, because such conduct would ordinarily be privileged.

(Respondents' Brief, p. 25).

Appellate Panel 2 held that, if the customs agents' conduct comported with federal law, the Supremacy Clause would bar any state tort claims in a FTCA case, regardless of whether liability could be found under state law.

Not only is there no conflict between Florida and federal law in this case to warrant an application of the Supremacy Clause, there was no evidentiary support for the position of Appellate Panel 2 that Friedland and Lavenka "complied with the full spectrum of federal statutory, regulatory, and constitutional law and did no

more than was essential to carrying out their duties." *See* Appendix A, at 63a. In fact, at trial, Petitioner had attempted to introduce into evidence the applicable federal regulations and Customs directives that Respondents had violated, but this evidence was excluded by the district court. Therefore, evidence that would have established if they complied with Customs regulations was not contained in the record evidence.

Moreover, pursuant to the district court's findings of fact as to Petitioner Denson's FTCA claim, the issue remains as to whether it was objectively reasonable for Respondents to conduct the increasingly intrusive, degrading and medically dangerous body cavity searches of Petitioner Denson in the absence of her consent and without any reevaluation or balancing of the level of suspicion against the level of intrusiveness and indignity. Likewise, as to Petitioner Denson's FTCA assault claim, the question of whether the force Respondents directed towards her was reasonable under the particular facts and circumstances remains unanswered.

CONCLUSION

For the foregoing reasons and as stated in their Petition, Petitioners respectfully request that the Court grant certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

BARBARA A. HEYER
HEYER & ASSOCIATES, P.A.
Attorneys for Petitioners
1311 S.E. 4th Avenue
Fort Lauderdale, FL 33316
(954) 522-4922